No. 7937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

—— 3

RICHARD C. HYLAND, doing business under the fictitious name and style of Hyland Bag Company,

Appellant,

vs.

MILLERS NATIONAL INSURANCE COMPANY (a corporation), DUBUQUE FIRE & MARINE INSURANCE COMPANY (a corporation), NATIONAL RESERVE INSURANCE COMPANY (a corporation), MINNESOTA FIRE INSURANCE COMPANY (a corporation), FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY (a corporation), THE MERCHANTS FIRE INSURANCE COMPANY (a corporation), WESTERN INSURANCE COMPANY OF AMERICA (a corporation), and NATIONAL LIBERTY INSURANCE COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLEE, WESTERN INSURANCE COMPANY OF AMERICA.

FILED

APR 1 3 1936

PAUL P. O'BRIEN,
CLERK

H. A. THORNTON,
THORNTON & WATT,
THORNTON & TAYLOR,
311 California Street, San Francisco.
Attorneys for Appellee,
Western Insurance Company of America.

Subject Index

Page

Introduction 2

As to the Facts 4

As to the nature of the action 4

As to the insurance carried by appellant 7

As to the nature of the fire 9

As to the extent of the fire 13

As to the values at the Hyland plant 16

As to the method adopted by appellant to show values at the Sacramento Street plant 28

Comparison of Hood & Strong's inventories of November, 1929 and October, 1930 43

As to duplication of purchases included in Hood & Strong's reports of October 21, 1920, in their report of October 13, and in their amended report of October 13, 1931 46

As to appellant's evidence as to the amount of loss or damage 76

As to the Radford inventory 88

As to the evidence of actual damage to the merchandise. 102

As to the pricing of Radford's inventory and proof of loss 109

As to the Newhall "fictitious contracts" 123

As to other false swearing by appellant during the course of the trial 130

As to the auction sale 134

As to the policy of insurance of this appellee 139

As to the Law of the Case 142

As to construction of policies of insurance 142

As to excess insurance 143

As to the measure of recovery 144

As to fraud and false swearing 145

As to alleged errors predicated upon the admission of evidence 155

Page

As to Errors Relied Upon by Appellant 155

As to the first error relied upon 155

As to the second error relied upon 166

As to the third error relied upon 171

As to the fourth error relied upon 174

As to the fifth error relied upon 176

As to the sixth error relied upon 177

As to the seventh error relied upon 178

As to the eighth error relied upon 182

As to the ninth error relied upon 184

As to the tenth error relied upon 187

As to Appellant's Query "If Appellant Is Entitled to Recover, What Is the Amount He Should Recover, and How Should It be Apportioned?" 192

Table of Authorities Cited

Pages

American Eagle Fire v. Vaughan, 35 F. (2d) 147 154
American Home Fire Assur. Co. v. Juneau Store Co., 78 F. (2d) 1001 154
Arnold v. American Insurance Co., 148 Cal. 660 170
Aronsen v. Frankfort Ins. Co., 9 Cal. App. 473 170

Bank of Anderson v. Home Ins. Co., 14 Cal. App. 208 170

Claflin v. Commonwealth Ins. Co., 110 U. S. 81 (28 L. Ed. 82) 148
Collins v. Finlay, 65 F. (2d) 625 162
Cuetara Hermanos v. Royal Exchange Assur. Co., 23 Fed. 270 150

Demarest v. Westchester Fire Ins. Co., 255 N. Y. S. 325 152
Domalgalski v. Springfield, 218 N. Y. S. 164 152

Fidelity Union Fire Ins. v. Kelleher, 13 F. (2d) 745 ..... 141, 143

General Laws 1909, p. 509 145
Globe & Rutgers Fire Ins. Co. v. Stallard, 68 F. (2d) 237 .. 151
Goorberg v. Western Assurance Co., 150 Cal. 510 170
Greiss v. State Investment etc. Co., 98 Cal. 241 166
Guttner v. Switzerland Gen. Ins. Co., 32 F. (2d) 700 143

Horwitz v. N. Y. Life, 80 F. (2d) 295 159

Illinois Central R. R. v. Crale, 281 U. S. 57 145
Imperial v. Coos County, 141 U. S. 452 143

Johnson v. Umsted, 64 F. (2d) 316 .... 155, 159

Kohner v. National Surety Co., 105 Cal. App. 430 170

Liberty Tea Co. v. LaSalle Ins. Co., 238 N. W. 399 154
Los Angeles Gas & Electric Co. v. R. R. Comm., 289 U. S. 287 165

McCullough v. Penn Mutual Life Ins. Co., 62 F. (2d) 831 162

National Reserve Ins. Co. v. Scudder, 71 F. (2d) 884 .... 161, 162
North River Ins. Co. v. Clark, 80 F. (2d) 202 144
Northwestern National v. McFarlane, 50 F. (2d) 539 .... 141, 143

Orenstein v. Star Ins. Co., 10 F. (2d) 754 150

Panama Mail S. S. Co. v. Vargas, 281 U. S. 670 165
Parker v. St. Sure, 53 F. (2d) 706 161
Penal Code, Sec. 549 145

Strangio v. Consolidated Ind. & Ins. Co., 66 F. (2d) 330 ... 155

United Firemen's Ins. Co. v. Jose Rivera Soler, 81 F. (2d) 385 149

No. 7937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Richard C. Hyland, doing business under the fictitious name and style of Hyland Bag Company,

Appellant,

vs.

Millers National Insurance Company (a corporation), Dubuque Fire & Marine Insurance Company (a corporation), National Reserve Insurance Company (a corporation), Minnesota Fire Insurance Company (a corporation), Firemen's Insurance Company of Newark, New Jersey (a corporation), The Merchants Fire Insurance Company (a corporation), Western Insurance Company of America (a corporation), and National Liberty Insurance Company (a corporation),

Appellees.

BRIEF FOR APPELLEE,
WESTERN INSURANCE COMPANY OF AMERICA.

INTRODUCTION.

We agree with the attorney for the appellant in only one thing, namely, that this case is extraordinary. It can be so characterized not only because of the size of the record and the length of the trial, which started on October 13, 1931, and concluded on January 26, 1932, but also in view of the patience and vision of the trial judge, and the clear and comparatively brief way in which he has expressed the facts which were developed during the many weeks of the trial.

Counsel complains of the bitterness of the opinion because the court sets up in detail the facts upon which it finds that "in order to avoid any possible misunderstanding, I find the plaintiff was guilty of wilful and intentional fraud and false swearing in making his proofs of loss". (Vol. I, p. 233.)

In the preparation of a transcript of this length, it is only natural that due to inadvertence and the tremendous mass of testimony, there should be omissions of matters which may prove to be important. We are stating frankly, at the commencement of this brief, at two places we have quoted statements of the attorney for appellant which support findings of the court, and which will tend to shorten the brief, which must under any condition be fairly lengthy. We would not incorporate these statements if it were not for the attack made by counsel for the appellant on the trial judge, and we shall clearly designate in our brief the instances where we have incorporated such quotations.

Counsel also complains that by the decree appellant has not been able to defraud the various insurance companies, and that there is attached to his name the stigma of being guilty of wilful and intentional fraud and false swearing. These are matters which the appellant should have considered before embarking upon a course of action which would cause a Federal Judge to state:

> "Turning again to the question of fraud, since fraud is never presumed and since a forfeiture should not be decreed unless the evidence clearly warrants it, I have discussed with some detail the evidence which I believe supports my finding that plaintiff was guilty of fraud and false swearing in connection with his proofs of loss, and the pleadings and testimony in this case, and that his conduct has barred his right of recovery herein. I have not, however, discussed all of the evidence which supports my decision but have selected that which best illustrates, in my view the attitude and conduct of the plaintiff. Because of the serious reflection of this decision upon plaintiff, I have reached it reluctantly but feel that it is necessitated by the evidence introduced in the case." (Vol. I, p. 203.)

Counsel has referred to the fact that equity abhors forfeitures. While this is ordinarily true, equity will not refrain from enforcing a forfeiture where the evidence clearly shows the same should be enforced. Counsel also apparently overlooks the maxims that "he who seeks equity must do equity", and "he who seeks equity must come with clean hands".

AS TO THE FACTS.

AS TO THE NATURE OF THE ACTION.

The appellant originally filed proofs of loss claiming a merchandise value on hand at the time of the fire of $102,453.23, with a total loss and damage of $73,601.96. Out of this amount of loss set forth in the proof it was claimed that $15,645.25 represented "merchandise totally destroyed", in other words, "merchandise burned out of sight", as it is referred to in the testimony and in the brief of appellant. (Vol I, p. 423.) Thereafter, on the 19th day of June, 1930, appellant filed and served on appellees a claim that his loss, as a matter of fact, amounted to $76,-498.62. Four days later suit was filed in the Superior Court of the City and County of San Francisco in an attempt to recover this latter amount. The case was removed to the Federal Court and an amended complaint was filed claiming that the loss sustained by reason of the fire was actually $106,992.83. This claim presupposes merchandise totally destroyed or, as stated in Appellant's Exhibit B, "obliterated or out of sight", of a value of $46,139.46. (Vol. I, p. 440.) The appellee, Western Insurance Company of America, denied the claims set forth in the amended complaint, but admitted a value to the stock of a sum not in excess of $75,000, and damage to the property not exceeding $35,000. At the time of admitting that amount of loss this appellee did not have in its possession information developed later which showed that as a matter of fact the loss did not exceed the sum of approximately $10,000.

In addition to these denials this appellee set up a number of affirmative defenses based on the provision of the policy that "this entire policy should be void, * * * in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after loss." The affirmative defenses pleaded are as follows:

1. That in addition to the provision voiding the policy for fraud and false swearing, it is provided that the insured shall file proofs of loss in which he shall state, among other things, "his knowledge and belief as to the origin of the fire", and that appellant prepared and served upon appellee a proof of loss in which he stated that the fire occurred "which originated from causes unknown to this assured", and that he verified said proofs of loss, stating that the same was true and "that no material fact is withheld that the companies should be advised of." That said instrument was prepared for the purpose of making claim and inducing this appellee to pay a loss under said policy, and that said statements were untrue in that appellant at all times knew that said fire was of incendiary origin.

2. That appellant prepared and served upon appellees proofs of loss claiming that the damage caused by said fire amounted to the sum of $73,601.96, whereas in truth and in fact he well knew that the loss and damage did not exceed the sum of $35,000.

3. That on June 19, 1930, appellant caused to be prepared and served upon appellees a claim that the

loss by reason of said fire amounted to $76,498.62, whereas at all times he well knew that the loss by reason of said fire did not exceed $35,000.

4. That on or about the 23rd day of June, 1930, appellant filed and caused to be served upon appellees a complaint to recover the sum of $76,498.62, whereas at all times he well knew that the loss by reason of said fire did not exceed $35,000.

5. That on the 22nd day of October, 1930, appellant verified, filed and caused to be served upon appellees an amended complaint in the District Court, wherein he sought to recover from appellees the sum of $106,992.83, whereas he well knew that the loss and damage by reason of said fire did not exceed $35,000.

6. That by reason of the terms and conditions of the policy of insurance issued by appellee it did not attach or become binding until the loss exceeded the sum of $50,000 and that there was no insurance effective under the policy of this appellee.

7. That by the terms and conditions of the policy of insurance issued by appellee it was provided that appellant should furnish to appellee a monthly written report showing the maximum liability upon the last business day of the month and that in the event the same should be understated appellee's liability in the event of loss should be diminished by the amount of error, that if the allegations of the amended complaint were true that the value of the property at the time of the fire amounted to $132,947.44, the amount reported to this appellee prior to the loss

was understated in the sum of $30,494.21, and that inasmuch as the maximum claimed by appellant from this appellee amounted to $27,512.44, the amount of the reduction by reason of the understatement would exceed any amount claimed from this appellee, and therefore there was no liability on the part of this appellee under said policy.

AS TO THE INSURANCE CARRIED BY APPELLANT.

At the time of the fire appellant had in his possession policies and cover notes covering the stock aggregating $185,000. Of this sum $12,500 in the Dubuque Fire & Marine Insurance Company, and $5000 in the Minnesota Fire Insurance Company, and $17,500 in the Millers National Insurance Company had been written in April, 1929, $5000 in the Merchants Fire Insurance Company was written in May, $10,000 in the Firemen's Insurance Company was written in June, $50,000 in the Western Insurance Company was written in August, $15,000 in the National Liberty Insurance Company was written in September and $70,000 in the National Liberty Insurance Company written in October. (Appellant's Exhibits 31-39, inclusive.)

In addition to this insurance plaintiff took out $120,000 on use and occupancy, although he had never carried this type of insurance prior to May, 1929. (Vol. I, p. 529.) He also had $96,000 on furniture, fixtures and equipment. (Vol. I, pp. 174-5.) In other words, with the insurance recently placed on this

plant, in the event of a fire resulting in a total loss of its stock and equipment, R. C. Hyland would have collected from the various insurance companies $401,-500. Granting that the values of the machinery and equipment were $96,500 (for we were unable to produce any evidence on this subject at the trial, due to the fact that the property involved was only stock) and taking the figures set forth in Defendant's Exhibit UUU (Vol. V, p. 2723) which figures, by the way, have never been attacked, which show an actual cost to the insured of this stock to be $66,626.05, with a loss of $10,171.92, we find that as against a total value of stock, machinery and equipment of $163,000 appellant would have collected $401,500, or a net profit to him of approximately one quarter of a million dollars.

If we take the statement of the court that "I find that the value of the stock at the time of the fire was approximately $88,000" (Vol. I, p. 178) and add this to the $96,500, representing the machinery and equipment, we would find a total value in the plant of $184,500, which would have left this appellant a profit of $217,000 in the event that this plant was totally destroyed by fire.

Surely, such a situation, when coupled with the evidence which was produced at the trial, would have justified the court in finding that there was a motive and a reason for the incendiary fire which followed.

AS TO THE NATURE OF THE FIRE.

The court has so clearly and briefly set forth the facts in connection with this fire that we shall quote from the findings of Judge Kerrigan. (Vol. I, pp. 175-6-7-8.):

> "Considering the first defense, the evidence clearly shows that this was a 'set' fire and that plaintiff knew it when making his proof of loss. The fire occurred on Saturday evening, October 19, 1929. It had reached sufficient proportions to be detected and the alarm rung by 10:36 o'clock. Plaintiff and his manager of the factory, Miss Mitchell were the only ones in the factory in the late afternoon; they were there continuously until they left at about six-thirty except for an hour between four and five when plaintiff went for a walk because of a headache. After Miss Mitchell had gone through the factory locking the windows, they locked the factory and went to their homes. Plaintiff was informed of the fire by phone, notified Miss Mitchell and returned with her to the factory about eleven P. M. The fire lasted but a short time after the alarm was responded to according to the fire department officials in charge of extinguishing it. The following morning plaintiff returned to the factory as did the representatives of the fire department, the police department and fire patrol. Because the fire had apparently started in several different places and because of a prevailing smell of kerosene, the fire patrol and the police department were investigating a charge of incendiarism. Plaintiff was advised of this and asked who might have set the fire. He suggested three discharged employees who might have grievances

against him. His attention was directed to the various suspicious circumstances which I shall mention.

The witnesses testifying to the circumstances surrounding the fire are of two groups—the chiefs of the fire department in charge of fighting the fire and the men in charge of the fire patrol. Plaintiff has vigorously attacked the credibility of the latter witnesses on the ground of bias and interest. Their positions are created by law but their salaries are paid by the Underwriters' Fire Patrol of San Francisco. It is their duty to keep down loss by protecting stocks of goods from water damage and to investigate fires which are apparently of incendiary origin. The testimony of these men has, on so many material points, been corroborated by the fire chiefs, who are entirely disinterested witnesses, that I do not believe that their credibility has been shaken. The circumstances testified to show that there were four separate and distinct fires. In all but one of them there was evidence that kerosene had been used to start them. One fire originated on the first floor in back of the office and spread to the mezzanine. The fire started in a pile of burlap bags which had been soaked in kerosene. The kerosene had seeped through the floor and had soaked into bales of burlap directly under this in the basement. The principal fire was in the stair well and started on the second floor. This fire was entirely separate from the one just described. It was some thirty feet away and the door leading from the first floor to the stair well had been closed. There was no burning between. The type and depth of the burning of wood in the stair well indicated that it was a

'flash' fire or gas fire such as would result from the burning of the volatile gas kerosene gives off. The stairwell showed little or no evidence of burning between the first and second floors. On the second floor just outside the stairwell, near the open door leading to it, was a shallow pan of kerosene with cut pieces of burlap soaked in it. Another pan of kerosene was found on the same floor about sixteen feet away. There was another fire on the second floor in some *bails* of burlap across the room from the stairwell fire. Its origin was unexplained and there was no burning between the fires. On the third floor apparently another fire had been started near the stairwell. There was a drum of kerosene in which a hole had been punctured near the bottom standing by the door to the stairwell. Some oil seeped out, but as the cap had not been removed from the top, it did not flow freely and became 'air bound'. On this same floor there was another drum of kerosene on its side with several holes punctured about three inches from the floor. The kerosene had saturated the floor nearby for a distance of four or five feet. The fire did not reach this location. The fire in the stairwell burned up into the fourth floor where it mushroomed to the ceiling and burned through to the roof. Significantly, the pans filled with kerosene and rags did not belong where they were found, but belonged under certain machinery and the drums of kerosene had been dragged up from the basement. That the incendiarist was an amateur was shown by his leaving the caps on the drums and by his failing to open the windows and thus feed the fire with the necessary ogygen."

In this connection it is interesting to note that not only does the testimony show, without contradiction, that there was very little damage to the building, but also the court visited this building and had the opportunity of seeing conditions at first hand. Judge Kerrigan went over this building from roof to basement. (Vol. IV, pp. 1731-1746.) He saw the type of construction, the fact that much of the wood was oil-soaked, but unburned. He saw that lint and fibre, resulting from the manufacturing process still remained, also unburned. He saw that the fire had not been of sufficient intensity to even burn splinters and "furring" of the wooden beams.

In regard to the machinery, the court had not only the testimony of Arthur Langrock, an employee of the Pacific Diamond H Bag Company, who removed this machinery to, and installed it in the plant of the latter company, that there was no fire damage to the machinery (Vol. IV, pp. 2075-2077), but also the court visited the premises of the Pacific Diamond H Bag Company and personally saw this machinery and its condition.

Photographs were taken by the Police Department showing the conditions in the plant and the extent of the damage to the stock.

The evidence is uncontradicted that this was a flash fire. R. V. Smith states:

> "Well, this was a flash fire, and it seemed to me as though it just hit the edges of these piles, here, the first four or five piles, and the edges near the fire had been singed, and that was very noticeable, because there was just a certain height

that this flash had hit the piles, and it had not been of long duration, because the lower part of the piles were not burned at all." (Vol. V, p. 2680.)

Fire Marshal Kelly states:

"No, the casing of the stair well was not entirely consumed, it was not, I would consider that that was burned, with what we would classify a flash fire. The evidence there showed it had been a flash fire, for the reason that the amount of the tongue-and-groove surrounding the partition of the stair well was burned to such an extent that there had to be some fuel burned beyond recognition to create that amount of burned vapor without the burned material burning." (Vol. IV, pp. 1967-8.)

These witnesses, and many others, testify as to the separate fires and as to the use of kerosene. We shall not quote the testimony at length as there is no contradiction of it.

Fire Marshal Kelly also tells of his interviews with Mr. Hyland and Mr. Hyland's statements that he suspected three former employees. (Vol. IV, pp. 1983-4-5.)

AS TO THE EXTENT OF THE FIRE.

In addition to the first hand knowledge of the extent of the fire gained by the court in visiting the premises, and in addition to the testimony of the adjusters and various other parties who were in the building after the fire, we have the testimony of the

men who actually fought this fire. Battalion Chief John Mahoney, whose company was situated only two blocks from the scene of the fire (Vol. IV, p. 1890), arrived there within a minute or two. The fire was coming through the roof in the rear, he did not see any fire on the first floor nor could he see any fire through the window of the second floor, where he felt the glass, which was cold. There was some fire on the third floor and there was fire on the fourth floor around the stairway and the skylight. (Vol. IV, pp. 1891-2.) He says that it took them approximately twenty or thirty minutes to get this fire under control. (Vol. IV, p. 1892.) He stayed on this floor for a while after the fire was out, looking for any signs of fire, and overhauling the stock and they were back at the fire house at 11:55, a period of one hour and seventeen minutes. (Vol. IV, p. 1893.)

Battalion Chief Edward D. O'Neill was all over this building the night of the fire and describes the conditions. In describing the fire on the third floor he states:

> "As to how long was it from the time that I got there until we had the fire under control (not overhauled), but under control and started to send the companies home, the principal fire, we got it out so fast it was not twenty minutes that they were working, and you could say twenty minutes on the top floor, for the last place of living fire, or visible fire, fifteen minutes on the third floor, less than ten minutes on the second floor, and possibly three-quarters of an hour on the mezzanine and first floor." (Vol. IV, pp. 1835-6.)

This chief was familiar with fires of this sort, having taken part in fighting the fire at the Pacific Bag Factory where it took them eighteen hours to overhaul a fire in a similar stock, and where they kept a line on the fire for a week, and having fought the Nottson Factory fire, where it took them eleven hours to overhaul and kept a line on for fourteen hours thereafter. (Vol. IV, p. 1848.)

As to the Hyland fire, he states:

> "As to what was the damage that was caused by that fire, well, with the occupancy of that particular building, we would say it was a small loss, that it was rapidly extinguished, in fact, we prided ourselves on the stopping of that particular fire; on coming in on the alarm of the fire we thought we would lose the building, and then it was just a question of confining the fire, and then we found out in a short period of time that this fire was under control, so we were congratulating ourselves on our work as firemen, self-praise, as it were, and it was followed up by the chief of the department in lauding everybody that had taken part in the fire. It was the fastest stopped fire that I have ever seen in my life in an occupancy of that sort." (Vol. IV, pp. 1849-50.)

The testimony of W. D. Gardner shows that as a matter of fact the thread was not even burned off the machines on the fourth floor, except on the first three machines closest to the fire. As a matter of fact, this thread was not discolored. (Vol. V, p. 2452.)

This witness also testified that the rolls on the presses on the third floor had not started to run.

These rolls are made of glue and glycerin and are so sensitive that in the valleys of California these rolls would melt down due to heat in the summer. The witness demonstrated that these rolls would blister after having water applied to them, and made a demonstration in court. He also testified how rolls would sag at a temperature of 110 to 120 degrees, but that the rolls on the third floor had not started to run. (Vol. V, pp. 2458-60.)

AS TO THE VALUES AT THE HYLAND PLANT.

It will be remembered that in addition to the factory at 243 Sacramento Street, where the fire occurred, appellant also had a warehouse at 1328 to 1340 Sansome Street. Nowhere in the books or records of the appellant is there any segregation showing values at the Sacramento plant or at the Sansome Street warehouse. *However, as we shall point out to the court, there is absolutely clear and convincing proof that the value at Sacramento Street must have been less than $90,000.*

The books show a total valuation at both places amounting to $153,056.36. While there is considerable testimony to support this, we are satisfied to refer only to the stipulation as to this figure. (Vol. III, p. 1528.)

The book inventory at Sansome Street as of October 19, 1929, the date of the fire, as shown by Hood & Strong, was $64,074.33. This is $401.56 greater than is shown by an actual physical inventory taken at

the warehouse following the fire. This inventory taken by Mr. Taylor and Ledgett, showed a value at Sansome Street on October 19 of $63,672.77. (Vol. I, p. 253.) Deducting the physical inventory at Sansome Street from the total valuation at both places, we find that the value at Sacramento Street, as shown by the books, amounted to $89,383.59. If we deduct the book inventory at Sansome Street as of October 19, we find that the book inventory at Sacramento Street on the date of the fire amounted to $88,982.03.

This figure is very important as it differs by only $709.48 from the "perpetual inventory" kept by Taylor, and by only $2165.72 from the inventory taken by Radford at Sacramento Street after the fire, and incorporated in the proof of loss sworn to by appellant showing a value at Sacramento Street of $86,-816.31. This discrepancy of $2165.72 shown in the Radford inventory is more than accounted for by increases in the quality of the burlap, which will be shown later, and which are admitted by appellant.

These figures as to values are shown by a "perpetual inventory", or "summary of stock sheets", as appellant prefers to call it. True, Mr. Taylor, the bookkeeper for appellant, denies that he ever had such a document, but he admits he did make up a summary in November or December, 1929, for his own use. Appellant admits that Taylor did keep a perpetual inventory. (Vol. I, pp. 447 and 499.)

Rosslow, the accountant representing Ernst & Ernst, and a witness most reluctant to give any testi-

mony favorable to appellees, admitted that he had seen and checked such a perpetual inventory in June of 1929.

> "As to knowing that the Hyland Bag Company maintained, with regard to burlap, a perpetual inventory, with lot numbers, and showing the amount used, so that they could, from time to time, tell how much of each of the lot numbers was on hand, each of the materials represented by the various lot numbers was on hand, I believe they did. *That is right, answering your question 'And you saw that at the time you were going through their books'.*" (Italics ours.) (Vol. II, p. 887.)
>
> "Mr. Palmer. Now, give us the work sheets on the perpetual record, please—the so-called stores on hand, the perpetual inventory account. They kept one; you have stated here two or three times that they kept one. I want to see what your work sheets show on that.
>
> A. As I recall that, I would check to their record.
>
> Q. But have you the data on that?
>
> A. I don't believe I would have such data.
>
> Q. I would like any reference to that account, please what have you there, Mr. Rosslow?
>
> A. This is a summary inventory prepared by Mr. Taylor.
>
> Q. Might I see that, please? This was given you at the time you were making this audit, was it, by Mr. Taylor?
>
> A. Yes.
>
> Q. And purports to represent what?
>
> A. *It is a recapitulation of the inventory, according to Mr. Taylor.*

Q. *Of his inventory?*

A. *Yes.*

Q. *His perpetual inventory?*

A. *I don't know whether he kept a perpetual inventory or not.*

Q. *Well, he kept an inventory of which this is a recapitulation?*

A. *That is right.*

Q. *In his books?*

A. *Yes.*

The set of sheets identified by the witness called 'Inventory, Hyland Bag Company, May 31, 1929' consisting of one sheet in longhand and attached thereto three sheets in typewriting with certain pencil notations thereon, was marked 'Defendants' Exhibit L for identification'.

That particular compilation that has just been introduced for identification would not be shown in that much detail by the ledger, but the ledger would agree in the total. Yes, the detail comes from some other record. That is right, kept by Mr. Taylor. Yes, as I recall it, *I must have seen this other record or account, because I checked to this—certain pages or certain lot numbers. That is right, Mr. Taylor kept another account in more detail on the question of inventory than would appear in the ledger. It is the account from which this material contained in Defendants' Exhibit L for identification came from, that is right.*" (Italics ours.) (Vol. II, pp. 893-4-5.)

"That is right, this inventory of work sheets on the inventory of May 31, 1929, furnished me by Mr. Taylor 'is supposed to be the detail of a perpetual inventory kept by Mr. Taylor'." (Vol. II, p. 898.)

"Oh, yes, I show to the yard in my inventory. Yes this summary that Mr. Taylor furnished me shows to the yard, but I do not know that he has sheets for making up the yardage of this. Correct, I checked this against my inventory. And found it absolutely correct. That is right, to the bale, to the yard, and to the bag.

Mr. Thornton. So even if it were not intended as a perpetual inventory as to quantities, it was at least correct, was it not?

A. It was correct as far as other than raw materials; I don't know that it existed for raw materials.

Q. You did not check invoices?

A. Oh, yes, I checked invoices.

Q. And you checked your inventory against invoices?

A. Yes.

Q. And you checked your inventory against this inventory?

A. Yes, if that is an inventory.

Q. *Well, whatever it is, you checked your quantities* against invoices and *against this?*

A. *That is right.*

Q. *And found this correct as to your inventory and as to the invoices?*

A. *That is right.*

The Court. What exhibit number is that you are referring to?

Mr. Thornton. *I am referring to Defendants' Exhibit L."* (Italics ours.) (Vol. II, pp. 920-21.)

It is true that Rosslow, after talking to the accountants for Hyland during the recess, attempted to change his testimony relative to this being a per-

petual inventory. The witness Terkelson, called by the National Liberty Insurance Company, also testified as to Taylor's statements relative to this perpetual inventory on cross-examination by Mr. Schmulowitz:

> "Q. But you do remember, don't you, that in the middle of June, or shortly after the 1st of June, there having been a delay in the submission of the June 1st report to you, that Mr. Taylor then stated to you that from that time on he would be in a position to give you at a moment's notice the quantity of merchandise, because he was then preparing a perpetual inventory.
>
> A. That is right.
>
> Q. That is correct, is it not?
>
> A. That is right, yes.
>
> Q. So Mr. Taylor stated to you early in June that he was then preparing a perpetual inventory, which had not previously been in existence; is that correct?
>
> A. No. It may be in substance, it depends on how you interpret it. Mr. Taylor said that the accountants were there, I don't know what firm, but he told me at the time that the accountants were there making up an audit of their books, and that when that was completed he would have a perpetual inventory all fixed so that at any time of the day or on any day that I chose, or if they should happen to have a fire, he could always glance at his books and tell me exactly what the values were at every location that the Hyland Bag Company was interested in." (Vol. VI, pp. 2964-65.)

The witness R. V. Smith, who was the adjuster for some of the insurance companies, and who was

very anxious to find values in excess of $100,000 (Vol. V, p. 2801) saw this inventory shortly after the fire (Vol. V, p. 2799), and was assured by Mr. Taylor that it was very accurate.

> "He told me that he had an inventory that he kept up to date at all times. I asked him if it was a perpetual inventory, and he told me that it was. I told him that I did not have much confidence in any perpetual inventories, and that I would prefer to have a physical inventory, and that we would make arrangements for the physical inventory, and he assured me that his was practically a physical inventory, because he said it was verified quite recently with the physical condition, kept up to date, and when I asked him if they did not take physical inventories, or if they relied on that entirely for the correction of their books or statements, he said, 'Oh, no, we take physical inventories occasionally'." (Vol. V, pp. 2622-23.)

> "And it was with that background of experience that I was prompted to state to Mr. Taylor that I did not have much confidence in perpetual inventories, and Mr. Taylor explained to me that was not a fault with his inventory, that his system had overcome that." (Vol. V, p. 2786.)

> "A. He explained that to me this way, you notice there is a lot of broken stuff up in this mezzanine floor——
>
> Q. I know there is some broken stuff, but we may differ as to whether it is a lot, or not.
>
> A. There is a quantity there, and that was the safety valve on his inventory, as he explained to me, any broken lots that was not used up on

> that order, instead of going to the basement, it would go back to the mezzanine floor, and then by a check of that they could correct the physical inventory. That is the reason he kept his inventory in such perfect condition, he said." (Vol. V, p. 2787.)

While Smith did not make a copy of that perpetual inventory, he did make a notation of the total shown at the plant, amounting to $88,272.55. This figure was given to him on numerous occasions and was verified to him by Mr. Hyland who obtained it from Mr. Taylor.

> "In the office that day when I called Mr. Hyland's attention to the fact that his book inventory or perpetual inventory very nearly proved the correctness of the physical inventory, when it was priced according to his costs—I have here a memorandum of that that I would like to refer to; on the inventory the prices were $86,816.31; and their book inventory or their perpetual inventory, as the figures were finally given to me, were $88,272.55. That figure had been given to me numerous times. This particular memorandum I made on a pad that day in the office while I was talking, during this conversation I have just related. Mr. Hyland said, 'I think you are mistaken about that, the values are $102,000, the book values are $102,000'. I said, 'No, you never had any such value as that, that is built up by the Hood & Strong method of applying the cost of sales'. I said, 'That has nothing to do with the actual merchandise, that is a fictitious value'. I said, 'Your book value, according to your own books, is $88,272.55, and that is predicated on your cost of merchandise'. I said,

'If you would take your inventory and price it correctly your values would be just the same as you would have if you had priced a physical inventory correctly'. He said, 'You are mistaken about that, Mr. Smith'. I said, 'You call Mr. Taylor and he will tell you that is correct'. So he called Mr. Taylor, and Mr. Taylor gave him this figure, and Mr. Hyland repeated it to me, $88,272.55. I just kept this memorandum as a reminder of that conversation.

I wrote it down as he gave it to me right there. I had it before me while we were discussing the loss." (Vol. V, pp. 2757-8.)

This perpetual inventory was also seen by R. B. Radford, who was employed by R. V. Smith and appellant to remove the merchandise from Sacramento Street, and as to whose activities we shall have more to say later.

"* * * I had a conversation with Mr. Taylor, and I believe, Mr. Ledgett, also, and they stated to me that they had on hand a perpetual inventory, or the stock sheets showing them at all times just what merchandise there was on hand, and they went into detail to explain to me how the merchandise was received, and how it was tagged and accounted for. Yes, I did say they informed me that each bag was tagged. Yes, I did find such tags on the various bales." (Vol. V, p. 2505.)

"As to, did I do anything in the way of checking or attempting to check this inventory, well, we did after the inventory, we checked and rechecked it about once a day, I would say at least I rechecked it possibly four or five times. Yes, I

> did make 'any check of any kind with any employes of the Hyland Bag Company'. With Mr. Taylor. Mr. Taylor said that it was accurate with this exception, that there were a few bags that could not be accounted for, but did not amount to very much, he did not tell me the number, also that I had some merchandise in my inventory that they did not carry on theirs. He did not point out to me what that merchandise was—he did not point it out to me, but said they did not carry the bale covers on theirs, and possibly some wire in the basement." (Vol. V, pp. 2530-31.)

Mr. Taylor also told Smith he had checked with Radford and the latter's inventory checked with his records.

Warner W. Grove, who was the adjuster for the National Liberty Insurance Company, and not for this appellee, also saw this perpetual inventory and when he found that the actual values at Sacramento Street were below $100,000 he wrote the letter, which is Exhibit 61, denying liability on behalf of the National Liberty. He states:

> "We were talking about the question of values, and I wanted to get some idea as to the extent of the stock values; there were preliminary questions I had put without much result, but at the end of the first or the second day I was told that the stock values approximated $90,000. Mr. Taylor told me that. I asked him what evidence he had to indicate that value, and he referred me to what he called a perpetual inventory, and I merely glanced at it and verified the fact that it contained figures of substantially $90,000." (Vol. V, pp. 2876-77.)

The only attempt that we find to contradict these witnesses, or impeach their testimony, is through the witness Taylor, who stated that he did make up a summary, but that it was not until November or December, and that it was made for his own purposes. We find, however, that the adjusters and Radford saw this perpetual inventory within a few days after the fire.

This record disappeared, or at least appellant failed to comply with numerous demands to produce the original. Naturally appellant recognized that it was directly contradictory of and a direct challenge to his claim.

Fortunately L. A. Hart, an accountant called by appellees, saw this perpetual inventory and had the foresight to make a copy of the first three pages summarizing the inventory at Sansome Street, the inventory at Sacramento Street, and the inventory of burlap at Sacramento Street, all as of October 19 and 20, 1929. It is indeed fortunate that Mr. Hart made this copy as otherwise we would have no record of this most important document. Mr. Taylor also impressed upon Mr. Hart the perfection of his perpetual inventory records.

> "A. Mr. Taylor, in response to questions that I asked him in December, 1929, relative to the perpetual inventory sheets, advised me that whenever he had occasion to verify them by physical inventories that there was never more than a bale or so difference between the physical inventory so taken and the perpetual inventory records.

> That is correct, 'the perpetual inventory sheet summary that' I am testifying to is Exhibit BBB, 'which shows the total goods on hand of $88,272.55'." (Vol. IV, pp. 2296-7.)
>
> "Yes, Mr. Taylor told me that his stock, so far as his book figures, never varied more than about a bale." (Vol. IV, p. 2319.)

This summary was introduced in evidence and we do not find in the record a single bit of testimony attempting to prove it incorrect. The first page, Defendants' Exhibit AAA, shows an inventory at Sansome Street as of October 20, 1929, of $63,672.77. (Vol. IV, p. 2290.) The second page, Defendant's Exhibit BBB, shows an inventory at Sacramento Street as of October 20, 1929, of $88,272.55. (Vol. IV, p. 2291.) It will be remembered that this is exactly the same figure as referred to by R. V. Smith. The third sheet, Defendant's Exhibit CCC (Vol. IV, p. 2292), breaks down the first item shown on Exhibit BBB of 331 bales of burlap of a value of $49,-267.78, showing the lot numbers, the type of burlap and the number of bales of each kind on hand on October 19th.

It is also interesting to note that we find in appellant's journal entry number 5007, made after the fire and introduced as Exhibit MM, which shows products on hand on October 19th totalling $88,286.55. This journal entry produced from the records of appellant differs by only $14.00 from the perpetual inventory.

AS TO METHOD ADOPTED BY APPELLANT TO SHOW VALUES AT THE SACRAMENTO STREET PLANT.

It will be noted that none of the figures or exhibits relative to the actual values were introduced by plaintiff, but were fortunately available to appellees due to the fact that certain witnesses had displayed the foresight to note, and in some instances copy, these figures.

Appellant first procured the accounting firm of Hood & Strong to make, under date of November 29, 1929, a report showing a purported inventory at Sacramento Street, as of the date of the fire, amounting to $102,453.23. This report was made up by taking the inventory shown on the books as of December 31, 1928, adding purchases, deducting sales, including an arbitrary percentage of gross profit, and deducting the inventory at Sansome Street. Let us bear in mind that this deduction for inventory at Sansome Street is the same figure as is shown on Defendants' Exhibit AAA. (Vol. IV, p. 2290.) To show the fallacy of such a method, let us assume that the fire had occurred at Sansome Street instead of Sacramento Street. We would have found that by this same method Hood & Strong would have built up the same apparent inventory of $166,126 (Vol. I, p. 248) and that they would have deducted therefrom the inventory at Sacramento Street, amounting to $88,272.55. (Vol. IV, p. 2291.) This would have shown an apparent loss at Sansome Street of $77,-853.45, or $14,180.68 in excess of the amount shown by the actual physical inventory taken after the fire.

Appellant at first accepted this figure of Hood & Strong, and incorporated it in the proofs of loss verified by him and served upon each of the insurance companies. He also adopted the Radford inventory as to lot numbers, description and yardage, placing his own prices thereon, and arriving at an inventory value after the fire of $86,907.98. This left him no alternative except to claim that a portion of his loss, amounting to $15,645.25, was represented by "merchandise totally destroyed". (Vol. I, p. 423.) Prior to preparing and filing this proof of loss, he was notified by R. V. Smith, in the presence of W. W. Grove, that his alleged values were not in accordance with the facts, and that if he filed such proofs of loss he would vitiate his policies.

> "* * * I don't recall who were present on that occasion. I think Mr. Grove was present when this was presented. I believe Mr. Hyland was there on that day. And myself. That is all. Just the four of us, I believe. No, I have not heretofore testified to everything that was said upon that occasion, not to everything that was said upon that occasion. We were together quite a bit then, and I would not attempt to cover everything. Yes, I have given you my best recollection as to the subject-matter that was discussed on that occasion. I think that was the occasion, as I recall it, and I think I so testified that that was the occasion on which I brought up the matter, I told Mr. Hyland the thing that I had told Mr. Sugarman, that it would be necessary for them to file a sworn statement, and they would have to swear to the prices, and that if they swore falsely to these they would vitiate their contract.

> Their attitude at that time was, and they said, they would take all the chances on that. Yes, I have already testified to that." (Vol. V, pp. 2832-3.)

After presentation of these proofs of loss, some of the insurance companies denied liability, others demanded appraisal of the loss.

In June of 1930 appellant served on the various insurance companies another instrument whereby he increased his claim to $76,498.62. Suit was then filed in the Superior Court, claiming this amount of loss. When this suit was transferred to the District Court an amended complaint was filed claiming a loss of $106,992.83. This was predicated upon a second report of Hood & Strong, dated more than a year after the fire, and only two days prior to the filing of the amended complaint. This report was introduced as Plaintiff's Exhibit 2.

It is quite apparent that Hood & Strong were willing to follow the instructions of appellant, and build up any kind of claim which he might desire. As we shall point out later, they were forced to admit in court that other reports were erroneous and that they could give no explanation of the errors incorporated therein.

In making this second report of October 21, 1930, they used one of their employees, Frederick W. Rickards, who had nothing to do with the first report of Hood & Strong. (Vol. III, p. 1161.) This report states:

> "Subsequent to the rendition by us of that statement, an examination by your Auditors,

Messrs. Lybrand, Ross Bros. & Montgomery, disclosed the fact that the accounts from which our statement of November 29, 1929 was prepared had not been adjusted to conform to values determined by physical count to have been on hand, and it was deemed advisable to have us go into the matter thoroughly in order that an accurate statement could be prepared." (Vol. I, p. 250.)

In this connection it is interesting to note that the facts which they claim were disclosed by Messrs. Lybrand, Ross Bros. & Montgomery, were as a matter of fact prepared by one Parker, formerly with that firm, but during all this time in the employ of Hyland. (Vol. III, p. 1230.) The report then further states:

> "Messrs. Ernst & Ernst, Auditors, in their Report to you dated August 5, 1929, certify to the value of merchandise on hand at May 31, 1929. Using this as a basis, auditing the purchase and sale accounts, and ascertaining the actual cost of the material sold plus direct labor applicable thereto from May 31, 1929 to October 19, 1929 (but without inclusion of factory overhead), we have developed the sum of $132,947.44 as being in our opinion a conservative valuation of the merchandise on hand at No. 243 Sacramento Street, at the close of business October 19, 1929." (Vol. I, p. 250.)

It is also interesting to note that Ernst & Ernst did not make a certified audit, but continually refer to their results as a "balance sheet". (Vol. I, pp. 255 and 260.) As Rosslow says:

> "No, I did not make a complete audit of the books, *I made a balance sheet audit.*" (Italics ours.) (Vol. II, p. 892.)

They made no verification of cash disbursements, or a claim set up under other assets, nor did they make any check of goods in process. "We completely verified by physical count all inventory quantities other than goods in process." (Vol. I, p. 257.)

Hood & Strong start their report of October 21, 1930, by accepting the apparent inventory as shown by Ernst & Ernst in their report under date of August 5, 1929, adding a figure which they claim represents purchases from June 1st to the date of the fire, making certain deductions and arriving at an apparent inventory at Sacramento Street and Sansome Street as of October 19, 1929, amounting to $196,620.21. They then deduct the inventory at Sansome Street (as shown on Defendants' Exhibit A (Vol. IV, p. 2271)), amounting to $63,672.77. From this they arrive at an apparent inventory at Sacramento Street as of the date of the fire of $132,947.44. *In other words, it is necessary for appellant now to claim that goods of the value of $46,039.46 were totally destroyed, obliterated or burned out of sight.*

Let us again examine what the result of adopting this system of arriving at an apparent inventory would have meant if the fire had occurred at Sansome Street. By the same methods, Hood & Strong would have arrived at the same apparent inventory, $196,620.21, at both locations. We would have found deducted from this the sum of $88,272.55 (as shown on Exhibit BBB, Vol. IV, p. 2291), which would have left an apparent inventory at Sansome Street amounting to $108,347.66. As a matter of fact, we know that the actual inventory at that location was $63,-

672.77. From such a statement appellant would then have argued that there was merchandise of a value of $44,674.89 burned out of sight, totally destroyed or obliterated. As a matter of fact we know that no such values existed at the Sansome Street location.

Incidentally, it is interesting to note Mr. Rickards' attempted correction of the statements contained in Hood & Strong's report of October 21, 1930.

> "My attention being called to the last line on page 1, in the report of October 21, 1930: 'We have developed the sum of $132,947.44 as being, in our opinion, a conservative valuation of the merchandise on hand at 243 Sacramento street at the close of business October 19, 1929.' No, I did not mean by that statement that I certified that there was that much material on hand positively on that date, that was headed 'Statement of apparent inventory'. Yes, this last sentence, to be correct, should have been, 'appearing to be on hand from our examination of the accounts'.
>
> My attention being called to line 3 in our subsequent report of October 13, 1931: 'The value of the burlap, cotton, and twine in bulk and bags on hand at 243 Sacramento street', yes, I make the same qualification with regard to the use of the words 'on hand', in our figures we always use 'apparent' to show that it is not an actual count." (Vol. III, pp. 1231-32.)

As careful accountants, and knowing that this matter was in litigation, in which the insurance companies were claiming that Mr. Hyland was guilty of fraud and false swearing, Hood & Strong made no investigation to ascertain whether or not physical in-

ventories had been taken subsequent to the Ernst & Ernst report. They did not take into consideration the physical inventories at Sansome Street and at Sacramento Street on September 30, 1929. (Vol. III, pp. 1166-67.)

Mr. Rickards did see the inventory taken at Sansome Street on October 15th, only four days before the fire. (Vol. III, p. 1167.) He stated, in reference to the inventory of October 19, 1929:

> "In order to prove that inventory, that was a physical inventory, and in order to prove that inventory we had another physical inventory on October 15, 1929, and *there could not be any better proof of physical inventories than those taken at different dates, that could be reconciled.*" (Italics ours.) Vol. III, p. 1168.)

Whether or not there was an inventory of October 15th at Sacramento Street, we do not know. It is in evidence, however, that there was in existence at that time a physical inventory of September 30, 1929, showing the merchandise contained at Sacramento Street. Although Mr. Rickards considered that there was no better proof of a physical inventory than another one taken at a different date, he made no inquiries as to this other inventory at Sacramento Street. He knew that there was one at Sansome Street, and was either derelict in his duty, or deliberately misstated the facts when he claims he was not familiar with an inventory of the same date at the plant. If there was no better proof as of that date at Sansome Street, why doesn't the same statement apply to Sacramento Street? Why, with the

knowledge that physical inventories had been taken did not Hood & Strong and their employee, Mr. Rickards, hesitate before putting in their report of October 21, 1930? The only answer is that their interest was in building up an apparent inventory larger than that which actually existed at this plant. As we shall later show, included in the purchases which they state were made between June 1, 1929, and October 19, 1929, are goods which were purchased and delivered prior to that date. Although the information was available to them in the form of contracts and invoices, and although they could have checked the dates of the purchases and deliveries of these goods, they did not do so. Again there could be only one answer and that was they were endeavoring to assist appellant in building up an exorbitant claim. Incidentally, the failure to make these checks and the failure to compare their work with the physical inventories of September 30th and October 15th led them into a ridiculous and most embarrassing situation.

In the early part of the trial, and while appellant was on the stand, there was introduced another report of Hood & Strong under date of October 13, 1931, Plaintiff's Exhibit 30. (Vol. I, p. 288.) This developed an apparent inventory of burlap, cotton and twine at Sacramento Street of a value of $124,728.20. This report was prepared by Rickards. (Vol. III, p. 1176.) He was very evasive relative to the data upon which he had prepared this report and could give us no information relative to the method followed by him.

"As to what I did to convert the item of bags into the yardage figures that I have in Column 7 of our report of October 13, 1931, well, it depends on the size of the bag. No, I did not measure to get the data as to the number of yards in the different sized bags, I got that information from the officials of the Hyland Bag Company, the only source of information one has of getting that information. * * * No, I cannot produce that data for you and have not it in our office. As I say, as I told you before, I believe I simply worked it out on a piece of scrap paper and put so many down and threw it away. I do not believe I did retain the figures from which I translated the bags into yards." (Vol. III, p. 1195.)

He admits that there is a discrepancy of 200,000 yards in burlap alone, and yet, taking the figure that he arrives at from yardage and poundage as being the value of the burlap on hand, and adding an item of some $8000, which is included as other materials, we arrive at the same apparent value of merchandise as is set forth in Hood & Strong's report of October 21, 1930. Hood & Strong either carelessly, or otherwise, or believing that the attorney for the insurance companies would not locate these discrepancies, made no attempt to reconcile these reports.

"Yes, the information in Column 7 of the inventory at Sansome Street was obtained from this physical inventory, Defendants' Exhibit J, which I have just looked at. Yes, in our report of October 13, 1931, the figures in this column 7 represent the yardage at Sansome street, both in raw material and in bags. Yes, I notice on

the second page of Defendants' Exhibit J, which purports to be the raw material, in the first column, a lot number. Yes, the second column there are certain 'x's', blue check marks. Yes, the next column under the word 'Quantity' there are numbers indicating the number of bales. That inventory totals 271 bales. And a total yardage of 542,000 yards. Answering your question if I will look at our report I will note I have includ*ing* all raw material and bags, only 465,722 yards, whereas in raw material alone on the very inventory that I said I took this from it shows 542,000 yards, and how do I account for that, I cannot account for that at this moment. As to whether I would say that if there were 542,000 yards of raw material at Sansome street and 136 plus 91 bales of bags besides, that my report correctly shows the amount of yardage at Sansome street, I can't remember the circumstances now, I can't reconcile the two figures, I can offer no explanation. Apparently there is a discrepancy there of some 200,000 yards of burlap. Yes, in arriving at the burlap at Sacramento street, where the fire was, according to the way I figure it in this report of October 13, what I have done is to figure out all the burlap in all locations first. Yes, I note a figure of 1,751,863 yards at the bottom of column 6. Then in order to arrive at what was at Sacramento street I did deduct the amount that I found to be at Sansome street. Yes, if you add 200,000 yards to the figures at Sansome street in order to arrive at the conclusion of what was at Sacramento street on the day of the fire, you would have to deduct that additional 200,000 yards. As to 'that would leave more than 200,000 yards less material at Sacra-

mento street at the day of the fire'—if that were true. I do see the inventory of Sansome street, but this report had to be made according to—you can see the date, October 13, 1931—the court knows what it contains, and we took many short cuts, so I may have also adjusted the bags to some other figure. Answering your question that I cannot say when the raw material alone in the inventory is over 100,000 yards more than I show both in raw material and bags, I cannot give you an answer at this time, not until I can go back into the thing. Answering your question: 'But, Mr. Rickards, using your report, using this figure of 465,000, using your figure, which varies some 200,000 yards or more from the actual inventory taken at Sansome street, your result at the end of your report, this identical report, here, of October 13, 1931, shows on the first page $124,728.20 of burlap on hand with no allowance for the cost of manufacture, and in this schedule that has been added so as to make the exact amount of the material found by you to have been there according to your calculation the exact amount claimed here by plaintiff of $132,947.44; That is the fact, is it not?' That is not the fact. As to what is incorrect about that, this statement, here, that we have on the board, arriving a $132,947.44 was prepared altogether without reference to this statement that you are now cross-examining me on.

Mr. Palmer. I know it was prepared differently, but preparing a statement along these lines with this 200,000 yards error, you still arrived at the same figure.

A. No, we did not arrive at the same figure.

Q. You arrived at a figure of $124,728.20?

A. Which is not $132,947.44.

Q. No, but you explained this morning that the difference between your item and $132,000 was the cost of making the bags which were reflected in your burlap, did you not?

A. And miscellaneous merchandise.

Q. And this brought your figure up to $132,-947.44?

A. There was no attempt made to reconcile the supplementary report with our first report." (Vol. III, pp. 1197-8-9.)

While it is pointed out to him that there is in the report an error of 200,000 yards at Sacramento, he claims that this would in no way affect their apparent figure of $132,947.44. (Vol. III, p. 1200.) He admits that he cannot explain the discrepancy. (Vol. III, p. 1201.) He cannot explain why his report shows only 2414 yards of 40-10 at Sacramento when the inventory taken after the fire shows approximately 96,000 yards of what is supposed to be the same material. (Vol. III, p. 1201.) On cross-examination by Mr. Schmulowitz, he admits that he made a "very stupid error" in this report. Mr. Schmulowitz then asked for leave to withdraw this report and replace it with another. This was denied by the court who stated that plaintiff might file another report. (Vol. III, p. 1215.)

On cross-examination his attention was called to the fact that the total inventory of 37-10 material at both locations on September 30th amounted to 56,000 yards, that there had been no purchases of that material between September 30th and October

19th and yet his report shows that the Hyland Bag Company should have had on hand at the time of the fire 633,968 yards of 37-10 burlap. His only explanation is "I can say as to that, it is evident that the description of burlap on the records of the Hyland Bag Company are in error". (Vol. III, p. 1220.)

He also testifies:

> "Apparently there was not any 37-10 burlap received by Hyland Bag Company subsequent to September 30, 1929, I have gone through these vouchers, they are in chronological order, and I have been informed that there had not been any 37-10 received. I have not seen the paper before you now call to my attention as an inventory of September 30, 1929, at 243 Sacramento street. I notice a lot of descriptive matter missing. I cannot see any 37-10. On the paper which you state is in evidence as an actual physical inventory taken at 1328-1340 Sansome street on September 30, I see here an item, 2199, 37-10, 28 bales, 56,000 yards. I cannot show you any other 37-10 on that inventory." (Vol. III, pp. 1219-20.)
>
> "I made out the report on October 13, 1931. I am willing to admit that is erroneous." (Vol. III, p. 1221.)

Later Mr. Rickards was recalled and another report of Hood & Strong, still under date of October 13, 1931, was introduced as Plaintiff's Exhibit 101. (Vol. III, pp. 1425-31.) This report shows an apparent value of burlap, cotton and twine amounting to $106,643.29. When it was pointed out to him that this differed from their report of October 1930 by

over $26,000, this witness stated "I have made no attempt in any way to reconcile this figure with the other, *it cannot be reconciled with the other.*" (Vol. III, p. 1435.)

He states that he did not go behind the figure of $132,947.44 to determine whether or not over $46,000 was claimed to have been obliterated. (Vol. III, p. 1437.) He also admits that although he had access to all of the books of the Hyland Bag Company, it is impossible to reconcile the figure of $106,000 contained in their latest report with the report of $132,-000 shown in their report of October 19, 1930. (Vol. III, p. 1437.)

He further admits that the only way this figure of $132,000 could be maintained would be to increase an item set up on a schedule designated as Schedule No. 1 and exhibited in the court room showing miscellaneous merchandise amounting to $8219.24 by approximately $18,000. (Vol. III, p. 1441.) No evidence was ever introduced to explain this discrepancy. It must also be remembered that this figure of $106,000 was produced by Hood & Strong after Mr. Rickards was thoroughly examined and cross-examined relative to a duplication of $22,552.50. It gives no effect to that duplication, although he admits:

> "* * * Answering your question: if that is true and there is no invoice representing that 300,000 yards, then there is an error in Ernst & Ernst's report, I cannot testify as to Ernst & Ernst's report. Certainly I accepted their figure of $533,631.50 which includes a figure of $22,-

737.12, for which neither I, nor Mr. Rosslow, nor the other accountants have been able to produce or discover any invoice. In their report of yardage and bales dated October 1, 1931, they show an item of 300,123 yards. I could not say there is an apparent error of *300,000* yards in that report, I did not make the inventory of Messrs. Ernst & Ernst. It was certified to by them and I cannot just say what is in it. *I first saw that item of $22,000 odd in a journal entry produced in court by Mr. Rosslow; what it is I don't know.* It purports to represent 300,000 yards of burlap. Yes, the journal entry is marked Defendants' Exhibit M. *That is the first time I saw that. I did ascertain that that amount had been added to make up the $533,631.50.* Since that time I have examined the work sheets showing that until they added on that 300,000 to take up that amount of $22,737.12, their report of yardage was 300,000 37-10 in excess of the bale lot shown in the work sheets. Answering your question 'So that, as far as you have been able to ascertain, there is nothing to show that that 300,000 yards, or that $22,737.12 is correct?' no, I assume no responsibility for the inventory figures of Ernst & Ernst. I took that for granted. Your question as to whether if there is 'that error of over $22,000 on that error of over 300,000 yards, that has naturally been carried forward' into my work, not as an error on my part, but as an error on previous work, is rather hypothetical. If there is an error in the beginning of the inventory, of course the final result will have that same error. I have not been able to identify that $22,737.12 anywhere in the books. I said yesterday that the invoice for a portion

of stock sheet 2199 was dated June 20, indicating that was the date the goods were received, while the invoice for the rest of it is dated, I believe, some time in July or August, if I remember it was dated in August. The invoice of June 20 is only posted one-third to Lot No. 2199, answering your question doesn't that cover the entire 150 bales? The invoice to which I refer is that of June 20, No. 387, representing 300,000 yards of 37-10 burlap ex steamship 'Silver Elm'." (Italics ours.) (Vol. III, pp. 1215, 1216, 1217.)

COMPARISON OF HOOD & STRONG'S INVENTORIES OF NOVEMBER, 1929 AND OCTOBER, 1930.

It is interesting to note that Hood & Strong's report of November 29, 1929, Exhibit 1 (Vol. I, p. 246), arrives at an apparent inventory of $102,453.23. Their apparent inventory arrived at in their report of October 21, 1930, Plaintiff's Exhibit 2 (Vol. I, p. 249), amounts to $132,947.44. This difference amounts to $30,494.21. The reason for this difference arises from the fact that in the first report there are no duplications of purchases, whereas in the second report, due to the manipulation of the records and stubbornness of these accountants in refusing to admit the same when it was shown to them, there is a duplication amounting to $30,462.12. This duplication is only $32.09 less than the amount of increase in apparent values shown by the second Hood & Strong report.

The entire duplication appears in two purchases from H. M. Newhall. The first amounting to $22,-

737.12, represents 300,000 yards of 37-10 burlap included in the Ernst & Ernst report by Rosslow under lot 2199 on the docks as of May 31st purchased from H. M. Newhall, but not at that time entered on the books of Hyland Bag Company. There is an additional purchase of 100,000 yards of 37-10 purchased from H. M. Newhall amounting to $7725. In view of the fact that these two purchases are set up by Hood & Strong in the report of October 13, 1931, at a cost of .08033¢ per yard, we find that the 300,000 yards represents $24,099 and the 100,000 yards represents $8033, the two together totalling $32,132 out of the apparent value of $106,643.29 set forth in that report. In line with our other calculation of adding $8219.24, which is claimed represents other merchandise, although there is not one word of evidence to substantiate this figure, and obtaining our total of $114,863.53 as the apparent value of the entire merchandise, deducting from that the value of 400,000 yards of burlap as figured in that report, we would find an apparent inventory of $82,730.53.

The original report of Hood & Strong, under date of November 29th, shows an apparent inventory of $102,453.23. This report used as a starting basis the book inventory of December 31, 1928. It appears, however, that a physical inventory was taken as of that date which showed that as a matter of fact the books were overstated in the sum of $20,734.89. This over-statement was corrected by a journal entry, number 4601 (Exhibit 159). (Vol. VI, p. 3191.) Hood & Strong, in making up their reports, did not take journal entries into consideration as they claimed

no adjustments on the books affected their reports. (Vol. III, pp. 1233-4.)

This exhibit, Journal Entry 4601 (Plaintiff's Exhibit 159, Vol. VI, p. 3191), however, as set forth in the transcript, is misleading unless the original is examined. On the original the notation "hold until correct amount is ascertained GPT", is noted in lead pencil, and was made by Taylor. The notation "made before physical inventory was priced", was written by Parker. As a matter of fact, it was made during the course of the trial and before this exhibit was offered. (Vol. VI, p. 3218.) There was no explanation of such an entry at the time of offering Exhibit 159, and it was necessary for us to bring this out on cross-examination of Taylor.

Deducting this over-statement of $20,734.89 from the apparent inventory of $102,453.23, we find an actual apparent inventory at the Sacramento Street plant, as of the date of the fire, of $81,718.34. Thus we find that the original Hood & Strong report, when corrected by the over-statement of the inventory of December 31, 1928, and the second Hood & Strong report, when corrected for the duplication of purchases of 37-10 burlap, differ by only $1011.99. We also find that they corroborate Taylor's perpetual inventory.

AS TO DUPLICATION OF PURCHASES INCLUDED IN HOOD & STRONG'S REPORTS OF OCTOBER 21, 1930, IN THEIR REPORT OF OCTOBER 13, AND IN THEIR AMENDED REPORT OF OCTOBER 13, 1931.

The original Hood & Strong yardage report of October 13, 1931 (Exhibit 30, Vol. I, p. 288), shows an apparent inventory of 37-10 burlap amounting to 633,968 yards. Of this amount, 494,000 yards, which is the equivalent of 247 bales, was supposedly at Sacramento Street. After this report was shown to be unescapably erroneous in one item to the extent of $18,085, it was amended, but the apparent total inventory of 37-10 burlap and the apparent inventory of the same material at Sacramento Street was not changed. (Exhibit 101, Vol. III, p. 1425.) *By these two reports Hood & Strong endeavor to do something which appellant could not do and has not attempted to do by any other witness.*

Taylor, who was the regular bookkeeper and accountant for appellant, the man who kept the records and was most thoroughly familiar with them, states:

> "As to having nothing to show what was actually at 243 Sacramento Street on the day of the fire, *I have never been able to work it out satisfactorily.*" (Italics ours.) (Vol. III, p. 1600.)

Taylor could not give us this information despite the fact that he tells us that his record of receipts of merchandise was 99.9% correct (Vol. III, p. 1461) and that it was a fine record, showing the receipts of materials between May 31 and October 19, 1929. In addition to these fine records, Taylor took inventories

every fifteen days at certain locations and every thirty days at others. (Vol. III, pp. 1368-9.)

Appellant has introduced three of these inventories. One of them represents a physical inventory at Sansome Street as of September 30, 1929, showing only 28 bales of 37-10 burlap on hand. These 28 bales appear under lot 2199, which, as we shall show, is a very important number. (Exhibit 98, Vol. III, p. 1393.)

The next is a physical inventory at Sacramento Street as of September 30, 1929, and shows that at that time *there was no burlap of this grade at the plant.* (Exhibit 98, Vol. III, p. 1397.) We also have the uncontradicted testimony of Rickards that no material of this kind was received subsequent to September 30. He ascertained this from an examination of the vouchers and from information given him. (Vol. III, p. 1219.)

The third document was a physical inventory taken at the Sansome Street warehouse on October 15, 1929. (Exhibit 82, Vol. III, p. 1302.) This inventory shows 26 bales of this material at the warehouse on that date under lot number 2199. The inventory taken at this same warehouse on October 21, after the fire, shows that on that date there were still 25 bales of this material in the warehouse under the same lot number. (Exhibit J, Vol. III, p. 1355.) It is quite patent, therefore, that although Hood & Strong undertake to do that which others could not do, and endeavor to show an apparent inventory of 494,000 yards, or 247 bales of 37-10 burlap, *there could not*

possibly have been at the Sacramento Street plant, on the date of the fire, in excess of three bales, or 6,000 yards, of this material.

This naturally calls for an inquiry to ascertain how Hood & Strong can show an apparent inventory of material which the records of appellant shows that he did not have. Incidentally, this leads us directly to at least $30,000 of the overclaim in the proof of loss which appellant, in endeavoring to support the Hood & Strong reports, would have this court believe was burned out of sight.

Going back to Hood & Strong's starting point for their report of October 19, 1930 (Exhibit 2, Vol. I, p. 229), the Ernst & Ernst report of May 31, we find an addition of $22,737.12 "recording material on hand, but not inventoried, at May 31, 1929, lot No. 2199, H. M. Newhall". (Exhibit M.) This sum is included in the total of $533,631.50, which is used as the starting figure by Hood & Strong. (Vol. III, p. 1215.)

Rosslow, the accountant for Ernst & Ernst who prepared this exhibit at the time he was working in the plant in June of 1929, attempted to give a number of lame explanations of this amount, as to the material it represented, and as to where he saw that material. When it was pointed out that the stock sheet number 2199, from which this material took its lot number, showed that it was at pier 41, Rosslow was recalled on rebuttal and stated that he did not remember ever having been at pier 41. He did not remember where he got lot number 2199, or where he saw the mer-

chandise which was recorded under this lot number under Exhibit M. This was despite the fact that it is shown that 13 bales of 37-10 burlap under lot 2199 were on hand when he was making his inventory and were included in the sheets prepared by Taylor and by him given to and checked by Rosslow. (Defendant's Exhibit K, Vol. II, p. 881.) He could not even tell us what locations were represented by this Exhibit K, although it segregates the material as being on the first floor and on the mezzanine, which corresponds with the plan of the building at Sacramento Street, and that it then continues with an account of 115 bales of bagging at pier 11, 75 pounds of liners at pier 21 and 8 bales of 37-10 burlap under lot 2169 at pier 34. This Exhibit then proceeds to inventory other material which is set forth under the heading "locked", which he believes refers to a locked portion of the warehouse.

We find that Rosslow had prepared a summary of the sheets represented in Exhibit K, which was introduced as Defendants' Exhibit L. (Vol. III, p. 1356.)

In arriving at his inventory, which is incorporated in the Ernst & Ernst report on Exhibit L, he adds the sum of $22,737.12, which is designated as "Adj. #20" "Invty on dock". Adjustment number 20 is the portion of Exhibit M which reads, "recording material on hand, but not inventoried at May 31, 1929, lot No. 2199, H. M. Newhall". Pursuant to our demand, appellant then produced Mr. Rosslow's work sheet covering this item. Defendant's Exhibit EE. (Vol. III, p. 1592.) This work sheet is headed "Lot No. 2199,

on dock at May 31, 1929, Except for 23 bales on Sacramento Street ignored in inventory and cost records". This notation is made despite the fact that Exhibit K, prepared by Taylor, showed 13 bales of this material under this lot number. (Vol. II, p. 881.) This work sheet is then stamped "Hyland Bag Company", then there is some computation: 300,000 at 373 pence per hundred, £4662½ at the rate of exchange $4.85, making $22,613.12½, estimated L. C. (landing charges) charges $124, making a total of $22,737.12. Then in lead pencil there is added "Adj. No. 20". There is then added in lead pencil "No. 237 H. M. Newhall". Incidentally, in this respect it is very interesting to note that the entry of pence was originally 372, but has been changed to 373. Taylor had been questioned at length relative to this matter and could give us no explanation. He was invited to produce any invoices supporting this claim. He testified, among other things:

> "Answering your question: from my examination of the invoices which have been produced in court by the Hyland Bag Company, representing purchases of 37-10 burlap from H. M. Newhall & Co., can I tell you any 37-10, other than that referred to on Sheet 2199, that 150 bales representing 300,000 yards, that could possibly have been on hand prior to May 31, 1929; I could not tell." (Vol. III, p. 1514.)
>
> "If I can find any invoice for 300,000 yards of burlap of any kind from H. M. Newhall during the year 1929, except this one invoice representing burlap on the dock on May 31, *I will produce it in court.*" (Italics ours.) (Vol. III, pp. 1627-8.)

Neither he, nor any of the others who had spent many days working on the explanation of this item could produce an invoice, check or other record to support their contentions.

Despite the fact that the lot numbers would run in sequence, and that number 2199 would be the next lot number to be set up, Taylor was so evasive that the court finally stated that this number must have been obtained by Rosslow from the records of appellant.

> "That I don't know, where Mr. Rosslow got the lot number 2199. I could not say that was on the bales. I don't know where he got that—yes, we did have a tin on the bales usually, answering your question as to whether we did not generally have the lot numbers on the bales, but this lot, I don't know where he got it from. I don't know where 2199 came from. He had never been there before, no.
>
> The Court. It is obvious, of course, that there was such a lot number.
>
> A. *It would be the next numeral lot number at that time, yes.*
>
> The Court. He must have gotten it from your records.
>
> Mr. Palmer. In other words, then, what you meant by that last answer, Mr. Taylor, was that 2199 was your next lot number that was to be set up?
>
> A. It would run along in sequence, 2197, 2198, 2199.
>
> I meant I think I saw 2198 on one of the stock sheets. That is the reason I said that. *I believe 2198 was the last one that had been en-*

tered up in our books prior to the time that I prepared those typewritten sheets for Mr. Rosslow. *Yes, the next one would be 2199.* Yes, in some way Mr. Rosslow, at the time he took the inventory on May 31 and the next day, got on that day the lot number 2199. As to 'Even though you had not set it up in your books?'. I don't recollect where it come in." (Italics ours.) (Vol. III, pp. 1488-9.)

Taylor also endeavored to show that this data was made up by Rosslow and that the material could not have been purchased from H. M. Newhall & Co. as their invoices were always in American dollars.

"Yes, those are the sheets that Mr. Rosslow gave me. My attention being directed to Defendants' Exhibit K, and on a sheet which has been numbered 7, the notation at the top in red crayon 'Ten bales out 6/1/29'. I now find the same sheet among the sheets given to me by Mr. Rosslow; I do not find on the sheet handed to me by Mr. Rosslow any notation similar or identical with the notation appearing on Sheet 7, there is no such notation here. There is no such notation on any page of the pages handed to me by Mr. Rosslow. I have not at this time any independent recollection concerning that notation, or any circumstances that might have given rise to that notation.

My attention being directed to Defendants' Exhibit M, which was produced by Mr. Rosslow as one of his work sheets, and particularly to the third item on that page, being 'E. E. Adjustment No. 20, recording material on hand but not inventoried at May 31, 1929, Lot No. 2199, H. M.

Newhall, $22,737.12'. I do not recall seeing Mr. Rosslow making either that entry or any entry similar in character. I do not know from what source Mr. Rosslow got the information that appears to be reflected in that particular entry.

Since the trial of this case started, I have assisted several auditors when they were working upon their investigation of the invoices and records of the Hyland Bag Company, on and prior and subsequent to May 31, 1929, for the purpose of determining whether or not that entry of $22,-737.12 could be identified; I have been requested to assist them.

Mr. Schmulowitz. And have you placed at the disposal of those who have made these requests of you all information and data in the office of the Hyland Bag Company?

A. Everything that I know about.

Q. So far as you know, have you personally been able to find any invoice carrying that precise amount of $22,737.12?

A. No sir; it is just something out of the clear sky, I don't know anything about it." (Vol. III, pp. 1379-80.)

"I recall the form in which invoices were submitted by H. M. Newhall & Co. for burlap purchased from them. As to whether those invoices were rendered in British pounds or in American dollars, always American dollars. As to from what vendors did the Hyland Bag Company purchase merchandise who rendered invoices only in British pounds and not extended into American dollars, from Calcutta; the Calcutta merchants. That would include the Ludlow." (Vol. III, p. 1381.)

Mr. Rickards obligingly took this cue and despite the fact that Rosslow's work sheets showed the yardage, the lot number, the fact that the material had been purchased from H. M. Newhall & Co., was on the dock at May 31st, and had not been entered in the books of Hyland Bag Company, endeavored to justify the fact that they had included this purchase as being one occurring subsequent to the Ernst & Ernst report *because these work sheets showed a purchase in pence and H. M. Newhall & Co. invoices were in dollars.*

> "The Newhall invoices, to the best of my belief, always extended their figures in dollars, which would lead me to conclude that it was not a Newhall invoice or a Newhall record that was seen." (Vol. III, p. 1242.)

This explanation apparently satisfied appellant and his counsel, but unfortunately appellees insisted upon the production of the Newhall contract (Exhibit Z). (Vol. III, p. 1517.) This contract is on the letterhead of H. M. Newhall & Co., Newhall Building, San Francisco, and is numbered 387. It is dated April 3, 1929, and states that H. M. Newhall Company have that day agreed to sell to Hyland Bag Company 300,-000 yards of 37″ 10 oz. burlap delivered in good order and condition on board the Motorship "Silver Elm" at Calcutta, India, to be shipped to San Francisco, California, on or about April 7, 1929, at 372 pence per 100 yards, C. & F. San Francisco. (Vol. III, p. 1517.) Attached to this contract is a letter of confirmation under date of April 6th confirming the sale

of the same material at a price of 372 pence per 100 yards, plus insurance, cost of letter of credit, state tolls and duty and one pence per 100 yards commission. Here we find why Rosslow first entered on his work sheets 372 pence and later changed it to 373 pence to include the commission.

There is also attached to this exhibit an invoice from George Henderson & Co., of Calcutta, to H. M. Newhall & Co., showing that there was shipped to them on the "Silver Elm", 150 bales of 37″ 10 oz. burlap, bearing the marks "India HMN 51 37″10oz./40" Kamarhatty, S.F. 3875/4024. (Vol. III, p. 1322.)

In view of the fact that this court probably is not familiar with the marking of burlap, we desire to state the evidence clearly shows that all burlap is marked by stenciling on the bales. This clearly appears from all the testimony. The figures at the end of this description, 3875/4024, means that this shipment begins with bale number 3875 and includes 150 bales up to and including bale number 4024. These figures represent the range of the shipment. It is undisputed that such markings cannot be duplicated as Taylor says:

> "Q. It is impossible, is it not, to have two sets of burlap carrying exactly the same marking, the same bale numbers, the same quality?
>
> A. *Yes, it is impossible.*" (Italics ours.) (Vol. III, p. 1516.)

Rickards was either absolutely incompetent as an accountant, or he was thoroughly dishonest and would

go to any lengths to support his report to build up the fraudulent claim of the appellant. On cross-examination he stated:

> "Since Mr. Rosslow was on the stand I have discussed with him the question of trying to locate that item of $22,737.12. He said he was not able to identify it against anything in our report. We were unable to locate an invoice representing the amount $22,737.12. Mr. Taylor's part in the matter was small. Mr. Rosslow believed that that amount had not been entered on the books and that was the reason for the correction. Answering your question: if that is true and there is no invoice representing that 300,000 yards, then there is an error in Ernst & Ernst's report, I cannot testify as to Ernst & Ernst's report. Certainly I accepted *their figure of $533,631.50* which *includes* a figure of $22,737.12, for which neither I, nor Mr. Rosslow, nor the other accountants have been able to produce or discover any invoice." (Italics ours.) (Vol. III, p. 1215.)

He further states:

> "Reference has been made this morning to certain Newhall invoices dated June 20, 1929, and August 6, 1929, and I have indicated that I am unable to identify the item involved in that adjustment of $22,000 odd with the amount appearing upon either one of those invoices. *The circumstances that each of those invoices with the dates just indicated is extended in American dollars indicates that there was not any relationship between the data appearing upon those invoices and the data that must have been or that probably was before Mr. Rosslow in connection with that adjustment.* I examined the work sheets of

Mr. Rosslow in which he had 300,000 yards worked out in British pounds to a Sterling figure. *The Newhall invoices, to the best of my belief, always extended their figures in American dollars, which would lead me to conclude that it was not a Newhall invoice or a Newhall record that was seen.* In other words, if I saw a record that was already extended in American dollars, there would have been no occasion for Mr. Rosslow to have made a computation converting British pounds into American dollars. Upon the face of the June 20, 1929, Newhall invoice the extension already appears, 4650 pounds, extended at $4.85 exchange, $22,552.50. On the invoice dated August 6, 1929, the amount appears in American dollars. Also there was a numeral or identifying figure in association with the adjustment of $22,737.12 which I found; on Mr. Rosslow's working paper, on the sheet wherein he worked out the yardage into American dollars, he had a numeral, No. 237, which would appear to refer to some document. Upon ascertaining that numeral, I attempted to ascertain whether there was any invoice among all of the Newhall invoices rendered to the Hyland Bag Company with that numeral 237 upon it. I could not find any Newhall invoice with a number approximately like that." (Italics ours.) (Vol. III, pp. 1242-3.)

And yet with all of this discussion, neither he nor any of the other accountants went to H. M. Newhall & Co. to see if they could get any information, nor did they go to the steamship lines or to the custom house. If they had been making an honest endeavor to present a proper claim they would have made such

an investigation. It will be noted that Rickards, Rosslow and Taylor all stated that this could not be a Newhall invoice, due to the fact that the work sheets, Exhibit EE, were in pounds and that Newhall's invoices were always in dollars. It will be remembered that they also stated that they could not find any amount which would in any way correspond to $22,-737.12.

Let us compare Defendant's Exhibit EE (Vol. III, p. 1592) with the Newhall invoice attached to Plaintiff's Exhibit 87. (Vol. III, p. 1320.) We find that Rosslow started to figure this on a basis of 372 pence and, evidently catching the one pence commission, changed it to 373 pence. He figured his rate of exchange at $4.85. To this he added *estimated* L. C. charges of $124, arriving at this total. It will be remembered that Rosslow's instructions were obtained from a letter dated June 5, 1929, Plaintiff's Exhibit 28. (Vol. I, p. 283.) Newhall's invoice was dated June 20, 1929. This accounts for the fact that Rosslow had to estimate the L. C. charges as to which he came very close for we find a difference of only 50¢ between his estimates and the charges which were actually made in the invoice. The rate of exchange used is identical, namely, $4.85. The results arrived at are identical, as far as they go, with the exception that there is an additional 50¢ on the Newhall invoice. We find that Rosslow figures 300,000 yards at 373 pence per hundred to amount to $22,613.12½. Newhall takes the advantage of the extra ½¢ and we find that by adding their charge for 300,000 yards at

372 pence, amounting to $22,552.50 to the fourth item, representing commission, amounting to $60.63, they then add $124.50 for marine insurance as against $124 L. C. charges by Rosslow, making a difference of exactly 50½¢ in the final calculations. The only reason that there is any difference of any kind between these calculations is that Rosslow apparently did not know that of the items of tolls, amounting to $15.32, and of duty, amounting to $1734.38, which are incorporated in the Newhall invoice of June 20th, bringing the total to $24,487.33. (Vol. III, p. 1320.)

Before proceeding with the further discussion of appellant's records, let us call to the court's attention the fact that these are all either on cards or on loose leaves. There could be substitutions at any time. Fortunately for us, however, in the majority of instances we find that the changes were made on the face of the records. We do know, however, that most of the entries were made after the fire, as Taylor has so testified.

> "Yes, I testified that for the last month or two before the fire I hardly touched the books. Yes, by 'books' I include the stock sheets, too. And the ledger, everything pertaining to the books." (Vol. III, pp. 1486-7.)
>
> "As to this bearing date May 31, but I entered it in October, there have been no entries in the book, at all, between May 31 and October, at the time that I started to work everything was in a chaotic state." (Vol. III, pp. 1524-5.)

We turn now to the stock sheet referred to in Rosslow's working papers, number 2199. (Exhibit

83.) (Vol. III, p. 1306.) We wish that the court would examine the original of this stock sheet, for it has been so altered and added to that the exhibit as set forth in the transcript does not give its full significance. We note that the typewritten date originally placed on this sheet was May, 1929. This date has been changed in lead pencil, admittedly by Taylor, to June 20th. (Vol. III, p. 1464.)

He also entered at the top of the sheet "Rec'd 6/2/29".

> "As to showing you on Plaintiff's Exhibit No. 83 where the information is on that sheet from which I can fix the dates that the goods referred to were received on Sansome or Sacramento street, the steamer 'Silver Elm' is here and May 20 has been scratched out and June 20 written over it, and up here August 6, 1929. I don't know when these goods arrived in the place. That stock sheet appears to contain information from which I could fix the arrival of the goods, yes. I don't know, I couldn't trace that. May 29 originally was written in and scratched out and June 20 in my hand, I saw it at some time and wrote June 20, yes, 1929, and up here, 'Rec'd 6/2/29'. I don't know what that means, but I think the 'Silver Elm' arrived in the harbor about that time. I think about June 1, of 1929, somewhere around there. I am not sure. As to whether the steamer arrived prior to that time, I had no occasion to remember it, recollect it." (Vol. III, pp. 1463-4.)

Even despite these statements of Taylor, we find no attempt to dispute the date of the arrival of the "Silver Elm" which brought these goods to this port.

On stock sheet number 2199 we find identically the same description as in the Henderson invoice represented by the sale of April 3, 1929. (Exhibit Z, Vol. III, p. 1322.) This description is "150 bales 37/10 burlap, 300,000 yards, marked India HMN 51, 3875/4024, Kamarhatty, Ex Steamer 'Silver Elm', Ex Pier 41". The fact that these goods were received on June 2nd, as stated by Taylor, is further evidenced by *this sheet* which *shows that they were used beginning June 3rd.* When stock sheet 559 (Plaintiff's Exhibit 84, Vol. III, p. 1309), was introduced in evidence, the first sheet was missing. Taylor either found that missing page, or reproduced it, and it was introduced as Plaintiff's Exhibit 158. (Vol. VI, p. 3186.) This sheet shows that 22 bales of this material had been made into bags on June 4th.

Incidentally, it will be noted that two other entries on the front side of the sheet are erased, and that there have been changes under the title "used". This is very important as there have been additions to this card and a deliberate attempt to confuse this burlap with other material that was received under stock sheets numbered 2187 and 2200. In the same way there has been entered on the carbon copy of the voucher in payment of this invoice, figures in red ink indicating that the invoice and voucher covered not only stock sheet 2199, but also stock sheets 2187 and 2182. We do not know when these red ink entries were made, but the brazenness of appellant and his employees can be more readily appreciated when we realize that this voucher is dated July 27, 1929, and these figures purport to segregate this material to

other lot numbers, which, according to the testimony of appellant's witnesses, were not purchased until after the date of the voucher. We proved by the testimony of Almer Newhall, and by the delivery order of H. M. Newhall & Co. (Defendant's Exhibit PP, Vol. IV, p. 2091), that the "Silver Elm" arrived at Pier 41 in San Francisco on May 25, 1929, carrying this 150 bales of 37-10 burlap, and that on May 31st the General Steamship Corporation was directed to deliver the same to Hyland Bag Company. We then turn to stock sheet 2187. (Exhibit U, Vol. III, p. 1238.) An examination of this stock sheet shows that not only are appellant's contentions relative to it untrue, but that this stock sheet has also been changed. It was originally dated April, but this was erased and the date of June substituted. This stock sheet called for 50 bales of the same type of material, namely, 37-10 burlap, but we find that the markings are entirely different. This burlap is marked "India L83 MA HMN 1/25", and "India L83 IA HMN 1/25". There is also a change, in that there has been other writing scratched out, namely, "their burlap warehoused for them". We shall deal with this later.

Appellant was careful not to fill in any contract number, steamer or pier on this stock sheet. Twenty-five bales of this burlap, being those marked "L83 HMN MA 1/25", arrived on the SS. "President Jefferson", on April 17, 1929, as is shown by Newhall's invoice attached to Plaintiff's Exhibit 88 (Vol. III, p.1324), while this invoice is dated August 6th and purports to complete a sale of August 2nd.

The records of the Dollar Steamship Company, as shown by a letter which was introduced in evidence under stipulation, shows that 50 bales were delivered to Hyland Bag Company, under orders from H. M. Newhall & Co. on April 25 and 26, 1929. (Vol. IV, p. 2095.) We shall show later that as a matter of fact the invoice of August 6th, covering this material, and the fact that this stock sheet shows that it was merchandise of Newhall warehoused for their account, was the result of appellant's dealings with Colbert, an employee of Newhall. We have already pointed out that these stock sheets are numbered chronologically, which would have put stock sheet 2199 in May, the date it originally bore. It is interesting to note that the goods represented by stock sheets 2184, 2185, 2186, arrived on the same steamer with the goods represented by 2187. Naturally, appellant could not permit the date of May to remain on stock sheet 2199, and the date of April on the stock sheet 2187 and still claim that these goods were not in San Francisco when Rosslow was doing his work, when they were included as later purchases by Hood & Strong.

According to stock sheet 2187 the material was made into bags on June 20th. Plaintiff's Exhibit 158, showing production of bags, shows, however, that the entire 50 bales represented by stock sheet 2187 had actually been made into bags on June 10th.

As a matter of fact, these goods represented by stock sheet 2187 were actually sold by H. M. Newhall & Co. to appellant under Newhall contract 9486,

under date of December 1, 1928. That contract was filled by deliveries from the "President Jefferson" of 50 bales, and "President Jackson" of 50 bales, under Newhall delivery orders 310 and 426. They were originally sold at 8.17¢ per yard.

The merchandise represented by stock sheet 2200, (Plaintiff's Exhibit 96) (Vol. III, p. 1384) consisted of 50 bales of 37-10 burlap, 100,000 yards marked "L-83 HMN SF 5/100," and arrived on the S. S. "President Jackson." This vessel arrived in San Francisco on May 29th and the entire 50 bales were delivered to appellant on June 4th, 5th and 6th. (Vol. IV, p. 2094.)

According to Plaintiff's Exhibit 158, the entire 50 bales was made into bags on June 8th. They were delivered to Hyland under Newhall's delivery order 426. (Vol. IV, p. 2091.) After the arrival of the 200,000 yards of material represented by these stock sheets, and after they had been actually converted into bags by appellant, Colbert, an employee of Newhall, to whom we shall later refer, cancelled this contract under date of June 20, 1929. Under date of August 6th a new invoice was made by Colbert, reducing the price from 8.17¢ per yard to 7.72½¢ per yard, and apparently setting up as a sale on August 2, 1929, goods which had actually been sold in December of 1928 at a higher price, and which had actually been converted into bags by appellant two months before the purported sale. This invoice also purports to be covered by Haslett Field Rec. F10259. Newhall could find in their records no copy of any

such receipt. It appears that as a matter of fact there were 100 bales of some kind of burlap in the Haslett Warehouse under such a receipt, but they were withdrawn on July 24th, 26th and August 2nd. (We have summarized this transaction which is set forth at length in the testimony of Almer M. Newhall in Vol. IV, pp. 2096-2102.)

We then produced Newhall's records showing that there were no purchases of 37-10 burlap in 1929, except the 300,000 yards shown by the invoice of June 20th, 350,000 yards shown by invoice of July 27th and 200,000 yards shown by the invoice of August 6th. Also there were no purchases of burlap of any kind from Newhall between January 1st and June 1st. The transcript of these records was introduced in evidence as Defendants' Exhibit NN. (Vol. IV, p. 2081.) The item of 350,000 yards, consisting of 175 bales, arrived on July 20, 1929, and is properly included in purchases after the date of Ernst & Ernst's inventory. (Vol. IV, pp. 2086-7.)

Rosslow stated he never gave his figures to Hood & Strong. He was forced to admit that anyone following Hood & Strong's method, without his data, would make an error of $22,737.12. (Vol. II, p. 917.)

> "With reference to Defendants' Exhibit EE, I cannot tell you where I got those figures of 300,000 yards and 373 pence. I cannot recall whether I saw Defendants' Exhibit Z or not, I know that I looked at some of these contracts. I could not say whether I saw this one having 372 pence per hunderd yards and 1 pence per hundred yards commission, or not. I cannot recall

where I got that information 'that these goods on the dock which had not been inventoried were lot 2199.' I am quite sure it was furnished by Mr. Taylor, either verbally or he handed me something that he had made up. I can't recall whether I saw stock sheet 2199 then, or not. *I must have had some evidence on which to base my figures of $22,737.12 adjustment. I cannot tell you where they came from.* As to where I got the information that this burlap was from H. M. Newhall, it would have been from the same source, but I could not tell whether it was written or the nature of the document. In the course of my audit I certainly would see invoices dated after the 1st of June. My audit continued for some time. As to Exhibit No. 88, an invoice dated June 20th, from H. M. Newhall, I could not say if I had seen that invoice before. Yes, you call my attention to the extension of pounds into dollars, amounting to $22,552 and some cents. There is also an item of commissions $60.63. Those two items do indicate the same amount in dollars that I arrived at by multiplying by 373 pence per hundred yards. Then I estimated $1.24 for letter of credit service, yes. That is the way I arrived at $32,737.12, yes. Or 12½ or 13 cents if the other way, yes.

Examining that contract and the invoice and my work sheet with the view of refreshing my memory as to whether that is the burlap that I found on the wharf at that time, I have nothing in mind other than what appears in my work sheet, and there is nothing there that I can definitely say that could be tied in with this invoice. I made no investigation since, to endeavor to ascertain whether that is the burlap that is rep-

resented by the invoice of June 20, although I have looked over my papers to see if there could be anything besides this one sheet of paper that might lead to something. I don't know what that figure 237 was. It is evidently a number, it is preceded by a number sign. No, I have no idea of what that could refer to. Yes, I did actually find that burlap on the docks at that time, with the exception of some bales that I found at 243 Sacramento street. I do not remember what dock that was. I can't remember now whether it was Pier 41. I have nothing in my work sheets to show that. I can't recall having found or having seen the invoice, itself, representing these particular goods for which I made the adjustment of $22,737.12. I can't recall whether I have seen this invoice of June 20 covering 37-10 burlap, H. M. Newhall, before, or not, I have seen many similar ones. I cannot possibly remember after two years whether I have seen any invoice of H. M. Newhall covering 37-10 burlap. No, I have no recollection of it. No, I have not been making some investigation during the last month, none other than, as I said, looking through my papers to see if I could get anything besides this. No, I have not been at the Hyland Bag Company working on papers, I went up there to talk to Mr. Parker once. Yes, concerning this particular item, it was in that connection that I looked through the papers, we wanted to see if there could not be something besides that 237, or any reference to this 237, or any other thing that could lead to it. *Yes, if that is the only burlap from H. M. Newhall & Co. sold or delivered to the Hyland Bag Company*

between January 1, 1929, and June 20, 1929, I would think that is the burlap that is represented by that invoice and that contract." (Italics ours.) (Vol. IV, pp. 1715-16-17.)

"If a person had not seen my work sheet and all they were furnished was $533,631.50, an extract of my report showing that inventory, there would not be anything to call their attention to that $22,737.12, not unless they went further and reconciled the figures of $533,631.50. You would have to go back and reconcile it, as I said, the book figures to the $533,631.50, and then carry on. Subsequent to May 31, and prior to the time that I came out to Court to testify, no one asked me for the work papers, personally. I am positive that those work papers were never furnished to Hood & Strong." (Vol. IV, p. 1720.)

In this respect it is interesting to note that Rosslow was instructed to produce the records of Ernst & Ernst showing the dates on which he did his work at Hyland Bag Company. It appears that his inventory pricing and checking was done on the 17th, 18th and 19th of June, after lots 2199 and 2187 were received by Hyland, and before the invoices were received from Newhall. (Vol. IV, p. 1722.)

Despite the testimony that we have shown, and despite Mr. Schmulowitz' doubt as to this item, appellant endeavored, on rebuttal, to prove that, as a matter of fact, the inventory of December 31, 1928, was not less than the book inventory of that date. As we have shown, appellant's journal entry number 4601 (Vol. VI, p. 3191), recognized that fact

and made that deduction. On rebuttal the inventory of December 31, 1928, was introduced. (Exhibit 160, Vol. VI, p. 3194.) We wish that the court would examine the original of this exhibit in following our statements relative to it, the additions made to this inventory and the ease with which such changes could be made.

The first page of this inventory shows bales of burlap, giving the lot number, number of bales and description of the material. The total of $115,145.64 appears in red ink. At the foot of the page, and below the red ink totals, we find added Lot No. X01, 34 bales 37-10 buralp $5425.29; lot No. X02, 104 bales 37-10 burlap $17,467.83. These two items total $22,-893.12. In this connection the court should note that it is necessary not only to wipe out this discrepancy between the book inventory and the physical inventory as of December 31, 1928, but that it is also necessary to build up the apparent inventory of one particular grade of burlap, namely, 37-10. This was necessary not only to show that there was no duplication by Hood & Strong, but to attempt to substantiate their so-called yardage and poundage inventory of October 13, 1931. (Exhibit 30, Vol. I, p. 288 and Exhibit 101, Vol. III, p. 1425.)

We have already shown that the material added at the bottom of the page of the inventory, namely, lots X01 and X02, represented 138 bales of this material. Attached to this inventory we find a recapitulation sheet. The center column of this sheet starts with a credit of $116,105.25. This total is the red

ink original total of the first page of the inventory, giving effect to an adjustment of $959.61—as shown on that page. The total as it now appears on that first page—obtained by subsequently adding X01 and X02, does not appear on the recapitulation sheet. On this sheet we find a total, in fact two totals, as it will be noted that there are several figures scratched out and changes made. One of these, representing the deduction of $20,734.89 set up in Journal Entry 4601 (Plaintiff's Exhibit 159) is, as a matter of fact, definitely tied in to the journal entry by the notation "J. E." where the amount is deducted from $31,-546.26 which was originally set up opposite item 25-13, and changed as the result of the deduction of this journal entry to $10,811.37. The total shown on that page was originally $178,473.35, from which was deducted the amount of the journal entry, leaving a total apparent inventory of $157,738.46. These totals do not include X01 or X02 put down below, and we do not know when this was done, nor do we know when X01 or X02 were added to page 1 after it had been totalled. We also find another addition, including this sum of $22,893.12. We also find an addition showing how this sum was obtained. It will be noted that the figures $5425.29 and $17,467.83 correspond with the additions to the first page of the inventory representing X01 and X02, respectively.

We then find, under date of February 28, 1929, that Journal Entry No. 4715 was made crediting R. C. Hyland Investment Account with $11,056.16. (Defendants' Exhibit FFF, Vol. V, p. 2383.) Under

date of March 31, 1929, Mr. Taylor then set up Journal Entry No. 4752 (Defendants' Exhibit GGG, Vol. V, p. 2583), crediting R. C. Hyland Inv. Acct. $3498.36. There is attached to this "Explanatory, stores used in manufacturing during March 1929". Taylor admits that Journal Entry No. 4715, amounting to $11,056.16, represented 67 bales on stock sheet X02 and that Journal Entry No. 4752, amounting to $3498.36, represented 21 bales on the same stock sheet, making a total of 88 bales, or $14,554.52. He also admits that he had already adjusted his inventory as of December 31, 1928. He does not remember when these entries were actually made, but admits

> "They might have been a little bit later than the month they bear date." (Vol. IV, p. 1810.)

We then get a further very interesting admission from him.

> "I don't know without going into it, I could not answer that. As to whether I had to increase my books over $20,000 to make my books correspond with my physical inventory, that is something I could not state off-hand, what the entry was, or what I did, that is going back a long time. I don't know now whether in February and March I increased my inventory, apparent inventory, by $14,554.52, that is going back a long time, I don't know now how I adjusted, what the detail of the 1928 adjustment was. I don't remember the detail, the books will show that.
>
> Yes, referring to Stock Sheet X02, that stock sheet is the year 1928. Yes, and represents bur-

lap made into bags in 1928, it should have been, yes. 521 is my number for bags in 1928. Correct, bags made in 1929 bear the number 559." (Vol. IV, pp. 1811-12.)

Referring to stock sheet X02 (Defendants' Exhibit KK, Vol. IV, p. 1812), we find that as a matter of fact that was a stock sheet for the year 1928. According to Taylor's admission the manufacturing number 521 refers to bags manufactured in that year, whereas bags made in 1929 bore the manufacturing number 559, a stock sheet which has already been referred to.

Stock sheet X02 shows on its face "year 1928". It also shows that the bales of burlap represented on that sheet were a monthly balance from 1927 carried over and used in February; that they were not, as a matter of fact, a balance carried over from 1928 to 1929. We find that the first seven items are totalled, showing 67 bales of a value of $11,056.16, corresponding with the credit set up to Richard Hyland Investment Account by journal entry 4715. (Exhibit FFF, Vol. V, p. 2383.)

On the left we notice the notation that it was used in February in making bags under the manufacturing number which Taylor states represents burlap made into bags in 1928, namely, number 521. Following this we find other burlap used under the same manufacturing number with a notation on the left "21 used Feby.", and on the right, opposite the third and fourth items, we find the notation "J. E. Feb. 1929". As we have already pointed out, Taylor admits that

this makes up the total of $3498.36 credited to Hyland's account by journal entry 4752. (Defendants' Exhibit GGG, Vol. V, p. 2383.)

Below, under the heading "used", we find that the 67 bales having a value of $11,056.16, were made into bags on January 31; and that the 21 bales, having a value of $3498.36, were made into bags on February 28. The sheet is marked "completed". (Vol. IV, p. 1813.)

As a matter of fact, the error in Hood & Strong's report is greater in regard to the 300,000 yards, as they figure it at .08033¢ per yard, amounting to $24,-099. In addition to that there is the other duplication which we have pointed out, of the 100,000 yards amounting to $8033, making a total error of $32,132. On the other hand, Rickards tells us that Rosslow undoubtedly made an error in making this adjustment. He states that a cancelled check would have been the best evidence of a purchase, that the record of the checks was complete, but that there was no check to H. M. Newhall. That, therefore, Rosslow must have made an error and there was no justification for this amount of $22,737.12. No wonder that Mr. Schmulowitz, who was at that time the attorney for appellant, stated:

> "Mr. Palmer indicates that the figures presented by the accountants produced by the plaintiff, except for the one issuable item arising out of the Rosslow report, or the Ernst & Ernst report, of $22,000, in connection with which I may frankly state to your Honor I am in doubt personally at the present time." (This quotation is

from Vol. 13, p. 1154 of the reporter's typewritten transcript and was omitted from the printed transcript.)

At another time Mr. Schmulowitz states:

> "I want to say in that respect, your Honor, that we have sought to place before the Court everything that we can possibly find that is pertinent to that particular item. Upon that basis I think Mr. Rickards has testified that he is satisfied personally that the additions of purchases are not a duplication of that item, but that he cannot determine from the Rosslow data exactly what Mr. Rosslow had in mind when he included that item as part of that $533,631.50. *That is the reason I say that until it is possible to tie it in, or until it is possible to demonstrate that there is a duplication, there is doubt as to that item.*" (Italics ours.) (Vol. III, p. 1581.)

Appellant had produced as Exhibit 84, stock sheet 559, which, as we have previously shown, represented goods manufactured in 1929. Mr. Taylor either found the original sheet, or as he says, reproduced it. This was introduced on rebuttal as Plaintiff's Exhibit 158. (Vol. VI, p. 3180.) In order to bolster up the claim and prove that there was actually 37-10 burlap on hand, two items had been entered at the bottom of the second page. These were out of order chronologically, and were apparently an afterthought. One of them was in lead pencil, supposedly representing 37-10 burlap, set up under lot X02, of a value of $8338.68. This was never set up on the books and was, as a matter of fact, added to these sheets after the fire, and after

the filing of the proofs of loss. The cross-examination of Mr. Taylor in this respect is very interesting.

"Plaintiff's Exhibit No. 158 is the preceding part of the sheet which Messrs. Cerf & Cooper did not have available in this written-up form when they examined the books. I have produced only the first sheet because I presume they made a copy of the other sheet; they had it in front of them and used it in the office for several days. X02 appears on that. It does on the other sheet, also; it does in the amount, I think, of $8000—$8338.60. In regard to that, yes, *I was examined at the time I was previously on the stand; as to 559. As to why I did not produce the entire sheet at that time in connection with Plaintiff's Exhibit 84, which also represented the 559, that is correct.* Since that time I have made up this sheet, I made it up in an hour, went right over the records and made it up; they did not make it up, so I made it up for them.

Mr. Thornton. Q. In regard to the second sheet of this, after August, you go back to somewhere in June and set forth in lead pencil X02——

A. I have it right here.

Q. Let us see it.

A. Yes. Let me give you the key to this.

Q. I think I have the key to it.

A. You have?

Q. I think so. In other words, the second sheet which you are now producing runs along with entries, the last entries being August 1, 6 and August 1; is that correct?

A. Yes.

Q. Then later 2199 is added under date of July 23: Is that correct?

A. Yes.

Q. And in lead pencil X02 is added under date of June 20—all of these appear in lead pencil, but give no date except June blank?

A. June blank.

Yes, that was added by me sometime after the completion of the stock sheet as it stood. I did not discover that until some time after the fire—along about that time, I think somewhere around in there. That has been there for a long time. It would have to be, because I would have no way of getting the number of bags made unless the material was all on that sheet. *This figure of 2199 and July 23 and X02 under June were added after the proofs of loss were filed, yes, surely. Yes, somewhere in 1930."* (Italics ours.) (Vol. VI, pp. 3213-14.)

AS TO APPELLANT'S EVIDENCE AS TO THE AMOUNT OF LOSS OR DAMAGE.

This evidence is well summed up on page 31 of appellant's brief.

> "Plaintiff testified that he noticed what he would judge a lot of ashes after the fire. (V. 1, p. 471.) It appears from the testimony of disinterested witnesses that a great deal of debris was removed following the fire. (V. VI, pp. 3050 to 3060; V. II, pp. 767-8.) There was some out of sight loss as the court finds." (V. I, p. 185.)

This is disputed by every witness produced by appellees who had been on the premises after the fire. We shall not unduly enlarge this brief by quoting the testimony of the adjusters, of the men of the Under-

writers' Patrol, who were there to protect the property, or the firemen. We shall refer to Mr. Radford, and his inventory, later.

The only other method of attempting to prove damage is by deducting from the figures of Hood & Strong's apparent inventories the amount of the Radford inventory.

We have already shown that the Hood & Strong apparent inventories are erroneous, and that they do not prove or tend to prove that there was any merchandise damaged or burned out of sight. In addition we shall show that the inventory taken after the fire absolutely corroborates this statement.

While the burden was on the appellant to prove his loss, the attitude throughout the trial was that the burden was upon the insurance companies to disprove it. There is not one word of evidence in the entire record to indicate what, if any, merchandise was damaged.

Appellant employed one Ben Sugarman as his adjuster. Sugarman, of course, was vitally interested in building up a large loss as his compensation was based on a percentage of the recovery. (Vol. II, p. 1008.) Yet Sugarman could give us no information to substantiate the fact that any merchandise was destroyed, obliterated or burned out of sight.

> "I did not tell the adjuster or Mr. R. V. Smith that the out-of-sight was my ace-in-the-hole. *As to R. V. Smith telling me in his opinion nothing was burned out of sight, I do not think I put it down to any definite amount; I told him*

there must be an out of sight there. I do not know what was burned out of sight. I endeavored to ascertain by the Hood & Strong statement. Yes, in answer to your question 'you took the Hood & Strong statement setting a value of $102,-000, you took the value set forth in the schedule attached to the proof of loss, and arrived at the opinion that the difference between them represented something that must have been burned out of sight'. Not having been in the premises at any time before the fire I could not tell you what was missing there. *I did not endeavor to ascertain what was burned out of sight.*" (Italics ours.) (Vol. II, pp. 1024-25.)

Taylor could not give us this information.

"* * * As to having nothing *to show what was actually at 243 Sacramento street on the day of the fire, I have never been able to work it out satisfactorily.* As to can I tell you at the present time the description of any bags that were destroyed in the fire, there must have been bean bags destroyed. There should have been bean bags in the plant at 243 Sacramento street on the day of the fire. I do not know whether or not there were any. I don't recollect. I did not see them physically, but, according to all the records, they should be there. No, I don't know where they should have been in the plant. I don't know whether they were finished or were in process, but I would say they were in process, but I don't know what state they were in. I don't know what floor they would have been on." (Italics ours.) (Vol. III, p. 1600.)

He further states:

> *"I cannot determine from the stock sheets what was in that plant in either burlap or bags on the day of the fire."* (Italics ours.) (Vol. III, p. 1601.)

He further states :

> "No, *I cannot 'explain that $46,000 burned out of sight'*, not now. If I went into it full I probably could." (Italics ours.) (Vol. III, p. 1604.)

We now come to the question of debris. Mr. Ledgett, Mr. Hudson, and other witnesses, testified that this was removed under the direction of Radford. Both Radford and Smith testify that no merchandise, with the exception of one load, was removed, except under Radford's direction, to the warehouse on Green Street, and that this one load was removed by Sugarman and returned to Green Street. They also state that there was no debris of merchandise, that all of the merchandise not only could be, but was, identified and moved to Green Street. Appellant produced a scavenger, one Baldocchi, who testified that there were seven loads taken out of this plant. He testifies:

> "* * * I do not keep a notation of what I put on these trucks, no, I keep track of the loads. No, I do not keep any record of what goes in them. Or of the weight, or the quantity, no." (Vol. VI, p. 3052.)
>
> "The Court. Q. When you say you hauled seven loads was it from any particular part of the building?

A. No, it all taken out from that ground floor on the back and the sidewalk, I never went upstairs.

Q. You made a contract to do what: to clean the building, or clean a certain part of it?

A. I gave a price of $70, and after the job was done we figured up and found we lost money.

Q. I want to find out whether you cleaned the whole building, or part of it.

A. We cleaned all the stuff that was on the sidewalk, and inside of the building on the ground floor.

Q. You did not clean any of the upper floors?

A. No, we didn't do anything with the upper floors?

Q. You cleaned the ground floor?

A. Yes.

Q. The basement?

A. Not the basement.

Q. Just the ground floor?

A. There must have been a lot that they brought down, they were bringing a lot of stuff down." (Vol. VI, p. 3053.)

"A. I don't know whether it was brought down, I didn't see them bring it down. There was a big pile off the main floor in the back, and there was a whole lot of canned stuff on the sidewalk." (Vol. VI, p. 3054.)

"A. I will tell you, all I know is to make seven loads there must have been a lot of stuff there." (Vol. VI, p. 3059.)

Prior to this man's taking the stand, the appellant had called one of his employees, a man named Hudson.

"Now, about removing this debris, as to whether we could clean up a floor and then remove the debris afterwards, Mr. Ledgett would tell us that Mr. Radford said we could move this or move that, and we would go up and clean it out. Oh, no, that was not after we removed all the merchandise, it was before. Yes, sir, that was before. I don't know how many days it was after the fire when we started moving this debris.

Mr. Thornton. Did you remove the ten loads in the Kleiber truck and the seven or eight that the garbage man took away before you started moving this merchandise to Green street?

A. We hauled the stuff out to the dumps before that, yes; and the garbage man, I believe was before that, too; I would not say for sure.

Q. Was Mr. Radford there when you were hauling that away?

A. Yes, sir.

Q. *But that was all before you started moving anything to Green Street?*

A. *Yes, sir.*

Q. And that was all gathered up under the direction of Mr. Radford?

A. Yes, sir.

Q. And he would tell Mr. Ledgett to tell you to take it away?

A. Yes, sir.

Q. This stuff that was taken away by the scavengers, do you remember when that was taken?

A. No, sir." (Italics ours.) (Vol. II, pp. 742-3.)

"Q. *A large part of it was sawdust and shavings, was it not?*

A. *Not all of it.*

Q. *A large part of it was?*

A. *Yes, sir.*

Q. *The bulk of it was?*

A. *I believe so.*

Q. Did Mr. Sugarman tell you to haul some stuff away before Radford gave you any instructions?

A. No, sir.

Q. Did Mr. Ledgett tell you to haul away some burlap that was on the floor, there?

A. *There was nothing moved until Mr. Radford told us to.*

Q. *There was nothing moved until Mr. Radford told you to?*

A. *No, sir.*

Q. *You are positive of that?*

A. *Yes, sir.*" (Italics ours.) (Vol. II, p. 744.)

There was consistent contention throughout the trial that despite this testimony there was over 100 tons of debris removed. To show plainly the fallacy and fraud in this connection, let us figure what 100 tons of debris would mean. One hundred short tons would amount to 200,000 pounds. According to the testimony, 40″ 8 oz. material weighs 8 ounces, or ½ pound to the yard. We shall take this as an illustration, although this material is much heavier than cotton, and much heavier than the average material shown in the inventory. The inventory shows only 117,797 yards of 40-8. There are only 29,767 yards of material heavier than 40-8 and 260,286 lighter than 40-8. The claim is so ridiculous that we are willing to take a figure much heavier than the average. Using

40-8 as our illustration, it would mean that 200,000 pounds would represent 400,000 yards of this material. On the cross-examination of Ben Sugarman there was introduced Defendants' Exhibit P. (Vol. II, p. 1007.) While this is not set forth in full in the transcript, it is sufficiently summarized. The percentages of damage set forth in this exhibit were used in figuring the damage to the various items in the schedule attached to the proofs of loss. The numbers of the items in Exhibit P correspond to the number of the items in the schedule attached to the proof of loss. In this schedule are shown many thousands of yards of material claimed to have been damaged 90%, yet this material is not classed as debris. As a matter of fact, it was salvaged and it was possible to identify the quality of the material and number of yards. It is therefore fair to assume that any material which would be classed as debris must have been damaged in excess of 90%. We shall, however, use the 90% as a working basis as we again desire to make our contention as obvious as possible, giving the appellant the benefit of every doubt. If this so-called debris was 90% destroyed there would be only 10% remaining. 400,000 yards therefore must have represented only 10% of the original material. On this basis 100 tons of debris would have represented 4,000,000 yards, or 2000 bales, using 40-8 as our standard. Using appellant's values for 40-8, as set forth in his schedule, we would find that the value of this 4,000,000 yards would be $320,000, and yet the highest claim we have for value at this plant was $132,000, of which in excess of $86,000 is accounted for.

In order to show further the type of testimony upon which appellant relies, let us illustrate what 2000 bales would mean. We made a demonstration relative to Mr. Hyland's contention concerning the stock on the second floor. In demonstrating his contention we had an extra model of this floor eliminating all machinery and anything else that would necessitate a deduction from the amount of floor space. We placed 150 bales on this second floor. These 150 bales more than covered the entire area, including that which we know was occupied by machines. We shall, however, again give the appellant the benefit of any doubt in this argument, and take 150 bales as an illustration. There were four floors to this building. Taking 150 bales to the floor, if placed singly and covering every inch of space, we would find that the fourth floor would accommodate 600 bales. In order to put in 2000 bales we would have had to cover each of these floors completely three and a third times. In other words, to put into this building merchandise representing 1000 tons of debris it would have been necessary to cover the four floors solidly to the depth of seven and a half feet (using the size of the bales as shown on our model list (Exhibit KKK, Vol. V, p. 2438), which is undisputed) leaving no space for the machinery or for the merchandise that was inventoried after the fire.

Perhaps an even better illustration would be in line with our Exhibit JJJ. This was the exhibit representing the second floor in accordance with Mr. Hyland's testimony as to its contents. While we do not

know whether or not the models representing merchandise are still in position in this model of the second floor, we have in evidence photographs showing the result of attempting to place this merchandise on that floor. An examination of these photographs will show the court that it not only blocked all doors and windows, covered all space occupied by machinery, but it projected above the height of the walls. 2000 bales of burlap would have filled two floors to the same extent after removing all machinery and the stock which was later found in the building and inventoried. These illustrations will probably give the court a better idea of the meaning of this claim relative to debris.

We would also like to know why, if there was any debris representing merchandise, Mr. Hyland's expert, Mr. Sugarman, was not informed of it, and why we have no testimony from him relative to debris and as to merchandise represented by it. We would also like to know why no attempt has been made to show either the trial court or this court what that merchandise was. We would also like to know why it was not called to the attention of insurance adjusters who were there to determine Mr. Hyland's loss.

Fire Chief O'Neil testified that burlap is not inflammable, and that he had had experience with it in a number of fires. He testified relative to the fire at the Pacific Bag Company where the entire building had collapsed and yet they could identify the burlap, although streams of water had been played on this for days.

Mr. Logie, who had years of experience in the burlap business, and also had experience with fires in burlap, stated that it was not subject to spontaneous combustion, not readily inflammable and that a building such as the Hyland plant would burn before the burlap.

Mr. Parker of Bemis Bag Company, their Traffic Manager, told us that he had had a great deal of experience in adjusting claims and that it was almost impossible to burn burlap. Other witnesses testified to the same effect.

In addition to that, R. V. Smith performed an experiment in court with one of the models representing an open bale, which consisted of loose pieces of burlap fastened together in the center. (Vol. V, p. 2680.) This was not introduced in evidence as the damage was so slight as to be almost invisible. This testimony and this evidence evidently impressed the court and we quote again from the opinion:

> "Plaintiff contends that burlap burns rapidly and even advanced the theory that it was subject to spontaneous combustion. Disinterested witnesses, including the fire department officials and men in the burlap business who were familiar with fires in burlap, stated that burlap burns readily only if exposed to an intense heat and if not piled or baled. An experiment made in court by igniting a small quantity of burlap demonstrated that it flashed up quickly for a few seconds, but immediately died out. It is very difficult to burn burlap when piled or baled. If baled it is practically impossible to burn it out of sight. One witness with long experience in the burlap

business testified that he had seen baled burlap come out of the hold of a ship where there had been fire for considerable time and estimated it would take a week for a bale of burlap to burn. In a recent fire in another bag factory, the building was practically burned down, yet bales of burlap which had fallen through the floors could still be identified. A Class C building, such as the one housing plaintiff's factory would be consumed before the baled burlap.

No great damage was done to the building or to the machinery. The principal burning was in and around the stair well and in the ceiling of the fourth floor and the roof above." (Vol. I, p. 183.)

Radford testified definitely as to the debris that was hauled away, and also as to the fact there was no merchandise obliterated, and that there was no merchandise which could not be identified.

"* * * 34 or 35 loads of merchandise were hauled from Sacramento street to Green street. No, I am not including in that total the load that Mr. Sugarman sent away. Yes, I am referring now just to the loads that went out under my direction. *No, there was not any merchandise that I found at Sacramento street which could not be identified. No, I did not find any evidence that merchandise at Sacramento street had been obliterated.* No, there was not anything said to me at any time concerning any claim as to merchandise having been burned out of sight or destroyed. Yes, I did remove debris from the Sacramento street plant. Well, the debris was removed in this manner, that when we started to

truck the bales from the basement, the floor was covered with sawdust, and we had to move that sawdust to one side, and we made probably small piles of it so that we could truck the merchandise out. The same occurred on the first floor; we removed the sawdust—I should not say sawdust, shavings is what they were—there were ten or twelve of these garbage cans in the place, we would fill those garbage cans up with shavings—I am speaking now, first, of the basement and the first floor—we would load those cans and set them out on the sidewalk, and they were picked up at different intervals by the scavenger people. I would say that a pick-up was made, well, perhaps daily, I would not say for sure whether it was daily, but at least every other day those cans were emptied by the scavengers. There were ten or twelve of those cans. As to whether there was any other debris outside of sawdust or shavings removed, well, on the upper floors there were shavings, and glass, and pieces of timber, and possibly sweepings, but not very much of that removed at that time. No, there was not any merchandise, or remains of merchandise included in the debris removed by me or under my direction." (Italics ours.) (Vol. V, pp. 2520-21.)

AS TO THE RADFORD INVENTORY.

Immediately after the fire, a party named Radford was employed, apparently by R. V. Smith, the adjuster for some of the insurance companies, and by Sugarman, to make an inventory of the stock. He came from Los Angeles, where he had done consider-

able work for the referee in bankruptcy. He was instructed by the adjuster to make an absolute complete check of everything in the building, and that if there was anything so damaged that he could not positively identify it to call it to the adjuster's attention. This is shown by the testimony of both Smith and Radford, and is corroborated by the testimony of Sugarman. In this connection it is interesting to note that Mr. Smith was anxious to do everything possible to legitimately build up the amount of the inventory. (Vol. V, pp. 2633, 2634.) His reason for doing this was that he was anxious to hold this appellee and the National Liberty Insurance Company. Sugarman, of course, was interested in building up the amount of the inventory and amount of loss, as his employment was based on a percentage of the amount of recovery. Radford's inventory was so careful and complete that appellant accepted it and swore to its accuracy in adopting a copy of it as a part of his schedule attached to each of the proofs of loss. Radford had work sheets on which he tallied each bale and each package of cut material as it was removed to the truck to be taken to the Green Street warehouse. Attached to each of these bales was a tag setting forth the lot number, the number of the bale and the type of the material. Mr. Sugarman was familiar with what Radford was doing and saw him making up these work sheets.

> "I remember very well seeing Mr. Radford taking the inventory. Yes, sir, I remember seeing Mr. Radford supervise the transportation of the merchandise. He had a clipboard in his hand

with some sheets on it—this was going on at the entrance to the Hyland Bag Company on Sacramento Street—he was going up and down through all the floors; and he would run over in his car, after the various loads, to the Green Street warehouse; he was giving instructions to the men over there as to the piling of the goods, and the airing of them; then he would come back to Sacramento street in time to get the other loads off." (Vol. II, p. 977.)

"I won't say Radford had a clip board when I saw him at Sacramento Street, but he had a board with some inventory sheets on it; to the best of my belief, he had sheets like that, to make memoranda on. As to his checking out the various items that were taken away from Sacramento Street, I don't know how he checked it, I didn't look over his shoulders; I know he was keeping tab." (Vol. II, p. 1014.)

In addition to these work sheets he prepared a bill of lading for each load before it left the Sacramento Street plant. These bills of lading were made out in duplicate and a copy went with the load to the Green Street warehouse for checking by Davis, Sugarman's man, who received these goods. There was an error on one of these sheets which was returned to Radford for correction. This one error consisted of giving the wrong lot number to one bale. (Vol. V, p. 2511.)

These bills of lading were produced from appellant's files and marked Defendants' Exhibit EE. (Vol. III, pp. 1585-6.) They were withdrawn by Mr. Taylor and later produced by him and marked Defendants' Exhibit FF.

"Mr. Taylor produced the Radford delivery receipts previously marked 'Defendants' Exhibit EE' which had been withdrawn by agreement, and the same being offered by defendants as the Radford bills of lading, they were received in evidence as one exhibit as Defendants' Exhibit FF. These receipts or bills of lading were prepared by Mr. R. D. Radford in connection with the removal of the salvaged merchandise from 243 Sacramento Street to the Baker-Bowers warehouse on Green Street. The characteristics and contents of the documents sufficiently appears from Mr. Radford's testimony, infra.

Permission of Court and counsel was given to Mr. Schmulowitz to withdraw the carbon copies of every bill of lading where there is a carbon copy and to make a copy of the original where there is no carbon copy." (Vol. III, p. 1593.)

As will be noted, not only the originals but the carbon copies were in appellant's files, and this information was not available to appellee until these documents were produced while Mr. Taylor was on the stand.

Not all of the goods were removed to the Green Street warehouse. Some of them remained at Sacramento Street. This merchandise is shown on pages 22, 23 and 24 of the Radford inventory. (Plaintiff's Exhibit 42, Vol. I, pp. 361, 375-6-7.) After the removal of the goods to Green Street, Radford went to that location for the purpose of inventorying this merchandise. As it is stated in appellant's brief:

"Radford took the inventory of the salvaged merchandise. (Vol. V, pp. 2503-4.) After the merchandise had been piled in the building he

> was unable to go ahead and make an inventory and state the correct grade of burlap, he was not an expert in burlap. (Vol. V, p. 2525.) He was given the assitance of a man named Gus Kraus; they went straight through, and Mr. Kraus would state the grade and count the number of bolts and call the total number of yards in each bolt to him, and he would record it. (Vol. V, p. 2525.) He demanded prices on the inventoried merchandise from Mr. Taylor. (Vol. V, p. 2528.) He took the word of Mr. Kraus as to the amount and grade of each lot of burlap." (Vol. V, pp. 2588, 2591.) (Appellant's Brief p. 84.)

The reason that Radford could not take this inventory was that the tags had been removed from the bales, the bales had been opened and the bolts stacked in piles. Radford had arranged to have the damaged and undamaged goods piled separately. As a matter of fact, we find that while he was working there the goods were moved around and the damaged mixed with the undamaged. Radford made no pretense of knowing anything about burlap, its weight, grade or value. The man Kraus, who assisted him, was an employee of Hyland, and detailed for that purpose, and later appeared as a witness for appellant. Radford took his word as to the type and grade of burlap, and a tag was attached to each pile, giving it an inventory lot number and attached to this tag was an adding machine slip showing the amount of yardage in each bolt and total yardage in the lot. (Vol. V, p. 2525.) Although Ledgett tells us that a man knowing burlap could tell the difference between the various grades with his eyes closed, we find that

the grades of burlap were increased in order to raise the values and thereby enhance the damage claimed in the proofs of loss. For instance, in the Radford inventory there is included 114,638 yards of what purports to be 36″-9 oz. burlap. Mr. Taylor, who priced this inventory, knew that they had no 36-9 burlap and yet it did not excite any suspicion in his mind when he put these prices on this inventory knowing they were to be used in making up a proof of loss.

> "On the Radford inventory, items 37, 38, 41, 43, 78 to 94, inclusive, 97 to 108 inclusive, 117, 118, 180 to 183, inclusive, 227, 235, 236, 237, 242, 243, 247, 248, 249, and 250 to 254, inclusive, 325, 350, all refer to 36-inch 9-ounce burlap. I don't recall any 36-9-ounce burlap on hand May 31, 1929. I do not recall any purchase of 36-9 subsequent to May 31. I believe we did not have on hand at the time of the fire any 36-9-ounce burlap. No, it did not excite any suspicion in my mind when I was called upon to put prices on 114,638 yards of 36-inch 9-ounce burlap when I knew that we had not had or purchased any burlap corresponding to that description. I did put prices on that burlap. I did know that those prices were to be used in making up a proof of loss to submit to these insurance companies." (Vol. III, pp. 1528-9.)

There was also included in the Radford inventory 86,091 yards of burlap which was listed as 40-10. Taylor knew he did not have any such quantity of 40-10, but yet again he had no hesitancy in pricing this quantity on the basis of its being material of that character.

"Items 39, 40, 42, 109, 110, 116, 119, 179, 185, 186, 187, 188, 191 to 200, inclusive, 202 to 217, inclusive, 219 to 223, inclusive, 239 and 240, and 245 refer to 40-10-ounce burlap. We had a very small quantity in the plant at the time of the fire. I don't believe we had 86,091 yards of 40-10 burlap on hand at the time of the fire, from the books. According to the corrected Hood & Strong inventory report showing an apparent inventory on October 19, 1929, at 243 Sacramento street, we had 2414 yards of 40-10 burlap, that sounds about right. I did, yes, price these 86,091 yards as representing 40-inch 10-ounce burlap. Yes, that was supposed to have been in the plant at 243 Sacramento street on October 19th. That did not excite any suspicion in my mind, not at that time. Yes, sir, at that time I knew I was preparing these figures to be incorporated in a proof of loss." (Vol. III, pp. 1529-30.)

He knew that neither his books nor the Radford bills of lading showed that he had any 36-9 burlap. (Vol. III, p. 1532.) By grading 40-8 burlap as 40-10 the value of this burlap was increased 1¾¢ per yard, or a total of $1905.15. By increasing 36-8 burlap to 36-9 he increased the value ¾¢ per yard, thereby adding to the damage. Radford also testifies that his bills of lading did not show any 36-9 or 40-10 burlap as being removed from Sacramento Street. (Vol. V, p. 2517.)

He does show, however, that there was 116,000 yards of 36-8 removed from Sacramento Street, and 49 bales, or 98,000 yards of 40-8. (Vol. V, p. 2518.)

Radford stated that some of the bales in the basement were wet, that on the first floor there might have been some where the covers were damp. (Vol. V, pp. 2518-19.) He also states that of the bales removed from the second floor there were two which showed signs of fire on the side and top. (Vol. V, p. 2519.)

By applying Sugarman's figures of percentage damage which are used in the schedule attached to the proof of loss, this of course, greatly increases the claim for damage to this material.

Radford's inventory gives us an interesting check on the question of merchandise burned out of sight, or totally destroyed. On his work sheets he made a note of all damaged material leaving the plant. He states:

> "If merchandise was damaged I so indicated it was damaged on the work sheets." (Vol. V, p. 2513.)
>
> "A. This damage will not include any water damage.
>
> Q. You say the damage will not?
>
> A. To the various bales of burlap.
>
> Q. I am asking you about the fire damage.
>
> A. On page 11, I am reading from the top of the page, Flat No. 1, that is indicated there as the first flat that was removed, 18 bolts of damaged burlap; Flat 2 calls for damaged cotton liners, 36-6-15 this does not state the quantity that might have been on this particular flat—Flat 4 is damaged burlap sacks incomplete. They were stamped Hyland Diamond. Flat No. 5 was 17 bolts of damaged burlap, Flat No. 6, 16 bolts

of damaged burlap; Flat No. 7, was 9 bolts of damaged burlap; Flat 8, was 17 bolts of damaged burlap; Flat 9, was one flat of damaged burlap sacks incomplete—'incomplete' probably indicates that, or does indicate that they were what we term cut but not sewed. Now reading from page 12, Flat 10 is one flat of damaged sacks incomplete. Flat 11, 20 bolts damaged burlap; Flat 12, 15 bolts of damaged burlap; Flat 13, 19 bolts of damaged burlap; Flat 14, 18 bolts of damaged burlap. Flat 15, 18 bolts of damaged burlap. There does not appear to be any on page 13 or 14. There is none indicated on page 15. On page 16 the last item, there is one roll of burlap. I believe that that was scorched, but it does not indicate its condition. There is no language here regarding it (as to what language refreshes my recollection). No, no language on page 16. It calls for one roll of burlap. I would say there is no indication it was damaged, but if my memory serves me right I believe it was slightly damaged, scorched. That is all I find. I do not find any indication of any burlap or sacks damaged by fire excepting on pages 11 and 12. On pages 11 and 12 I find a total of 15 flats that show indications of damage by fire. Yes, confined to pages 11 and 12. Yes, those do represent the total number of flats, or the total of merchandise removed from 243 Saramento street, showing evidence of fire damage, with the possible exception of a roll or two, I would say, I believe there were a couple of rolls, or maybe there was a total of 7 rolls removed; I know that there were some of them scorched, they were not damaged very bad, they were scorched.

As to flats, in the picture, Defendants' Exhibit F, that is a flat in the left-hand bottom of the photograph. Referring now to the picture of the mezzanine floor, and pointing to a wooden platform, yes, I believe they classify them as lift truck platforms; that is what I refer to in my work sheets as flats. There were fifteen of those with material represented by the description in my work sheets that were removed from 243 Sacramento street, that showed evidence of fire damage, that is correct. No, I do not remember approximately the size of those flats. I couldn't give you the dimension of them, but I can tell you about what they would hold, if that is what you are interested in. They probably would hold 2000 yards of burlap, or 2000 yards of sheeting, or 2000 sacks, maybe more or less. Yes, depending, as you suppose, on the type of sacks." (Vol. V, pp. 2515, 16, 17.)

In other words, the only damaged material that Radford found and removed were these 15 flats holding 2000 yards each, or a total of 30,000 yards of burlap damaged by fire. In addition there were the two bales removed from the second floor. If we grant all the burlap in these were damaged by fire, it would be an additional 4000 yards. There was some damage to two rolls which if it did show damage to all the material, would mean an additional 4000 yards, or a total of a maximum of 38,000 yards of burlap showing any fire damage.

Incidentally, this Radford inventory absolutely disproves appellant's claim as to any material amount of merchandise burned out of sight. The records of

Hyland show that on the date of the fire there were 190,571 bags in process.

It will be remembered that Exhibits AAA, BBB and CCC, (Vol. IV, pp. 2290-1-2), which were Hart's copies of the recapitulation sheets of Taylor's perpetual inventory, and his copy of the sheet showing bales of burlap at Sacramento Street on October 19th, have never been questioned. On Defendants' Exhibit BBB, we find that the recapitulation of sheet seven shows 190,571 bags in process. This sheet also contains the figure of 61,570 domestic bags. Turning now to Defendants' Exhibit J, which is the inventory taken by Taylor and Ledgett at Sansome Street, on the morning of October 21st, we find on page three that there are 136 bales, amounting to 68,000 domestic bags. On the bottom of this sheet we find certain figures corresponding to those heretofore given, namely, the 68,000 representing domestic bags at Sansome Street after the fire, 61,570 representing domestic bags at Sacramento Street, and 190,571 representing bags in process at Sacramento Street. It is true that Taylor tried to explain these figures by stating that they must have been obtained from Radford's inventory. However, we find that on Tuesday, July 15, 1930, at a time when he admits that his memory was much clearer as to the evidence of 1929, he testified:

> "We had 190,571 bags in process of going through the factory on the Saturday night of the fire." (Vol. III, p. 1546.)

Radford's inventory, however, showed a total of bags in process inventoried by him after the fire of

189,392. This figure was tabulated and checked by Mr. Parker, the accountant for appellant. In other words, out of a total of bags claimed by appellant to have been in this building in the course of process before the fire, all but 1139 are accounted for after the fire. Radford confirms this as he testifies that after he had given Taylor a copy of his inventory Taylor informed him that he was only a few bags off. (Vol. V, p. 2605.)

During the removal of the goods, Radford testified that he checked with Taylor or Ledgett as to the merchandise on every load that went out.

> "* * * I went up and ascertained from Mr. Taylor and Mr. Ledgett how many bales of that particular kind of burlap were supposed to be in that particular lot.
>
> Mr. Schmulowitz. Q. You did that every time you came to a lot number?
>
> A. *On every load.*
>
> Q. They told you they had a perpetual inventory?
>
> A. Yes.
>
> Q. Didn't they tell you they had stock sheets?
>
> A. It was the same thing.
>
> Q. It was the same thing to you, was it?
>
> A. Yes.
>
> Q. Did they use the words 'perpetual inventory'?
>
> A. I believe they did.
>
> Q. Didn't they use the words 'stock sheets'?
>
> A. Well, they might have used both.
>
> Q. They might have used only 'stock sheets'?
>
> A. Well, I would not say that.
>
> Q. Did Mr. Taylor inform you that stock sheets frequently had errors?

A. No, as a matter of fact he told me they were accurate, said there was very little chance for error.

* * * * * * *

"I did not run to every bale. I did not tell you I did. Yes, I just checked occasional ones, I went upstairs to find out how many bales were supposed to be in that lot. Yes, I personally did that with Mr. Taylor several times during the day. Yes, I did. As to that being quite vivid in my mind, pretty clear. As to, Mr. Taylor would turn to the stock sheets and check the particular numbers and say, 'That is right, Mr. Radford'—not always Mr. Taylor, sometimes Mr. Ledgett would determine how many bales there were. Yes, Mr. Ledgett would go to the stock sheets and check with me as I was making out these bills of lading, or after I had made them out." (Italics ours.) (Vol. V, pp. 2564-65.)

"Yes, I did make a check as to baled goods or other merchandise upon completing removal of those goods from Sacramento Street. I made that check with Mr. Taylor and Mr. Ledgett. As to what, if anything, was determined by that check, the exact amount or quantity of the various bales in the lots carried by them, or of the corresponding lots, or the lots that corresponded with the tags that were attached to the various bales. As to, was there anything said as to the quantity of the bales that I had removed, I made this check at various times with Mr. Taylor and Mr. Ledgett, to ascertain if I had removed the entire lots of any particular kind of merchandise, for instance, if there were twenty bales of, we will say, of any grade of burlap in the basement, I would ask him or he would tell me—he would

refer to his stock sheets or perpetual inventory, and tell me how many bales there were supposed to be in that particular lot, and in that way I would know that I had removed that complete lot. As to, did I make any final check on the total, well, I did after the completion of the inventory. Yes, that was after the completion of the inventory." (Vol. V, pp. 2521-22.)

"Q. Yes, and *in the inventory you have included only the material that was salvaged, isn't that correct?*

A. *All of the merchandise in the building.*

Q. What is that?

A. All of the merchandise in the building.

Q. That was salvaged, isn't that correct?

A. No, *all that was in the building.*" (Italics ours.) (Vol. V, p. 2609.)

R. V. Smith, the adjuster for some of the companies, also testified:

"Mr. Thornton: Q. Mr. Smith, did you on any of these floors that you have described or on any other floor see any indication of any merchandise having been burned out of sight?

A. There was no merchandise that was burned out of sight. There was no merchandise in the radius—no evidence of any merchandise in the radius of the fire that could have been burned out of sight.

Q. Was there any evidence of any merchandise having been burned out of sight in any portion of that building?

A. None, whatever.

Q. Was there any place pointed out to you, or did you make any inquiry as to any portion of

the building in which any merchandise was claimed to have burned out of sight?

A. *Many times I challenged Mr. Sugarman or Mr. Hyland to show me one place where there was something burned out of sight."* (Italics ours.) (Vol. V, p. 2691.)

AS TO EVIDENCE OF ACTUAL DAMAGE TO THE MERCHANDISE.

As we have just pointed out, Radford has stated that there was no merchandise obliterated or so damaged that it could not be identified, and that every bit of merchandise was inventoried, either in the plant at Sacramento Street or in the Green Street warehouse. He was asked as to the percentage of the merchandise which was undamaged and testified as follows:

> "Mr. Thornton. Q. From your experience during the time that you were at the Green Street Warehouse, could you estimate the amount or percentage, not asking you to place it in yards or dollars, of merchandise at Green Street which was undamaged?
>
> * * * * * * *
>
> A. You mean undamaged?
>
> Mr. Thornton. That was undamaged in any respect.
>
> A. I will say, I did not actually figure it out, but it would be safe for me to say 75 or 80 per cent.
>
> Q. 75 to 80 per cent of the merchandise at the Green Street Warehouse would not show any damage of any kind: Is that correct?
>
> A. That is correct." (Vol. V, pp. 2532-3.)

Smith testfies that before proofs of loss were filed, he met appellant and Sugarman at the Green Street warehouse, that Hyland claimed he could not use any of the merchandise and that he was going to claim a total loss. Hyland refused to proceed with an adjustment and Sugarman suggested that Smith go through the merchandise, put down his idea of the damage and that perhaps they could get together. He did this and that Sugarman told him there was no chance to get together as Hyland had already told him what was wanted. (Vol. V, pp. 2606-7.)

He states that he went through the various lots as shown in the Radford inventory, marking "F.D." where there was any fire damage, "W.D." where there was any water damage, and "O.K." where there was no damage, and setting forth the percentage of damage which he estimated on each of the lots shown in that inventory. (Vol. V, p. 2708.) He showed these percentages to Sugarman, who was with him part of the time. (Vol. V, p. 2709.) This instrument which he prepared at Sugarman's request, and showed him before the proofs of loss were filed, was introduced in evidence as Defendants' Exhibit TTT. (Vol. V, pp. 2710-2721.) He states that Sugarman prepared all the prices, the only thing he put on was the percentage of damage and pencil notation showing the cause of the damage. (Vol. V, p. 2709.) This witness then prepared a document showing a comparison between the claim of the Hyland Bag Company and the amount of loss and damage as he ascertained it. This was introduced in evidence as Defendants' Exhibit UUU. (Vol. V, pp. 2723-44.)

It is interesting to note that there was no attack of any kind by appellant during the course of the trial and no evidence introduced to contradict or refute these statements. In this exhibit Smith gave effect to the fact that 36-9 burlap should actually be 36-8, and that 40-10 should be actually 40-8. (Vol. V, p. 2745.) The first sheet is a recapitulation sheet in which he takes each of the pages and shows the cost and loss as claimed by Hyland and what he designates as the actual cost and loss. He states, however, that the cost as shown by him under the column headed "actual" is too high.

> "Yes, that cost is too high, in view of the testimony that has already gone in here from the Bemis Bag Company." (Vol. V, p. 2811.)
>
> "For a long time I couldn't get any prices around this burg. Because of Mr. Hyland going around and asking people not to give me prices." (Vol. V, p. 2812.)

And yet, with these prices which he admits are too high, he finds an actual value of this merchandise of $66,626.05, and an actual loss of $10,171.92. His method of determining these amounts is set forth on the other pages, which represent the Radford inventory, showing the unit cost, total cost, precentage of damage and loss as claimed, and also showing what he sets forth as the actual unit cost, total loss, percentage of damage and loss.

As we have shown, he did not know that Mr. Wyckoff and Mr. Young had made an itemized list showing the damaged and undamaged merchandise.

(Vol. V, p. 2750.) As a matter of fact, his percentages of damage were made before they saw the burlap.

Mr. Sugarman was called on rebuttal, but he did not question Mr. Smith's testimony. As a matter of fact, he corroborated it to the extent of testifying he was present at the time that Smith ascertained these percentages for damages.

A copy of this exhibit UUU was furnished to the attorney for appellant upon his statement that he would like to have it checked by his accountants. Evidently a check was made, as Mr. Hyland, when called on rebuttal, referred to a net shortage of $2.13 shown on the recapitulation sheet, and stated that a check showed that Mr. Smith was in error as to that amount, and yet there was no attempt made to attack Mr. Smith's testimony relative to values, percentage of damage, or the totals arrived at by him. It is also interesting to make comparison between his figures and those presented by Young and Wyckoff, and to find that in the one or two instances where Smith does not absolutely agree with them, although he did not know of their visit or of their work, the disagreement is caused by the fact that he has allowed damage where they found there was no damage to the material.

John J. Parker was called as a witness by the appellee and testified that he was Traffic Manager for Bemis Bros. Bag Company, that in the course of his duties he passes on damaged burlap for that company. That he was instructed to examine the Hyland burlap

at the Green Street warehouse. (Vol. IV, p. 2244.) He further states that 75 to 80% of the burlap was good, excluding that which showed fire damage.

John W. Wyckoff, then factory superintendent for Ames-Harris & Neville, was called. He testified that he had had occasion to determine damage on burlap in adjusting claims for his company. (Vol. IV, p. 2189.) He went to the Green Street warehouse in company with Mr. Young of Bemis Bag Company. There he examined every pile of burlap, except a few which were damaged badly, and he examined every pile of good burlap on either three or four sides to see if he could discover any stain or burn. (Vol. IV, p. 2191.) He found quite a few bales tagged as 40-10 which he put down as 40-8. He also found some tagged as 37-10 which he put down as 37-8. He also found quite a few bales marked 36-9 which he questioned as it might have been 36-8. (Vol. IV, p. 2192.) He states there were maybe ten or twelve piles that were pretty badly burned or stained from which they could get no salvage from a new bag manufacturer. (Vol. IV, p. 2193.) As he examined this merchandise he wrote down a report to submit to his employers. (Vol. IV, p. 2193.) Where he reported material was good he meant he figured it as new goods and they could take it in and use it as such. (Vol. IV, p. 2194.) He marked some of the bags as being "patched and pieced" and "some dirty". (Vol. IV, p. 2195.) He reported some burlap as stained and marked two items as "bad". (Vol. IV, p. 2196.) He went over those goods lot by lot and pile by pile, reading off the number and the yardage, and noting the type of damage, as he was

looking for damage. (Vol. IV, p. 2197.) The transcript sets forth in detail the lot number and the fact as to whether they showed damage or no damage. (Vol. IV, pp. 2198-9, 2200.)

On cross-examination it was shown he considered 75 to 80% of this material as good. (Vol. IV, p. 2201.) As a matter of fact, out of the 73,226 yards of cotton sheeting which he reported as good, he stated that Ames had used 40,000 to 50,000 yards of it for new liners for sugar sacks. (Vol. IV, pp. 2195-6.) They paid 4¢ a yard for this sheeting which was ⅛¢ below the market price of the date of purchase. (Vol. VI, p. 3033.)

C. T. Young, the superintendent of Bemis Bag Company, was called and corroborated the testimony of Mr. Wyckoff as to their inspection and making a list of the merchandise at the Green Street warehouse. (Vol. IV, p. 2235.) He stated they figured this stock the same as they would have a bankrupt stock instead of one that had gone through a fire. (Vol. IV, p. 2235.)

As we have already pointed out, these witnesses knew nothing about Smith, and yet they agree with him, except in one or two instances, where he allowed damage which they did not ascertain although they were there representing their companies for the purpose of ascertaining the amount of damage and making recommendations as to whether or not their employers should purchase these goods. A summary of their report shows they found 340,507 yards of material absolutely undamaged. They also found 167,-

948 bags undamaged. As we have before pointed out, there were 190,571 bags in process at the factory at the time of the fire. Of these, the Radford inventory accounts for 189,362. Young and Wyckoff find at the Green Street warehouse 167,948 of these bags absolutely undamaged. In view of this showing it is easy to understand why the trial judge stated:

> "The heart of the plaintiff's contention is that large quantities of goods were burned out of sight." (Vol. I, p. 182.)

and

> "Not only does the proof show negatively that there was no substantial quantity of merchandise obliterated by the fire, but it shows affirmatively that the amounts claimed were fraudulently built up." (Vol. I, p. 186.)

and

> "What I have said about the impossibility of an out of sight loss in this case establishes that the claim of $15,000 worth of goods obliterated as well as the subsequent claim of a larger amount were alike fraudulently excessive.
>
> There was lack of good faith in fixing the proportion of loss on the salvaged goods. I have referred to the fact that disinterested witnesses have testified that this merchandise was damaged not in excess of 25%. Yet a loss of $53,586 was claimed on this." (Vol. I, p. 191.)

AS TO PRICING OF RADFORD'S INVENTORY AND PROOF OF LOSS.

We have already shown that this pricing was done by Taylor at Hyland's direction. We have also shown that in pricing that inventory Taylor put down prices on 114,638 yards of 36-9 burlap, knowing that they did not have and had not purchased any burlap of that description, and also knowing that when he put those prices on the inventory that they were to be used in making up proofs of loss to submit to these insurance companies. (Vol. III, p. 1529.) We have also shown the same situation relative to Taylor's pricing 40-10 burlap.

Referring to the testimony of appellant, it will be noted that on cross-examination he was testifying as to various data from a card in his possession. This card was received in evidence and marked Defendants' Exhibit B. (Vol. I, p. 440.) It was in appellant's handwriting. It will be noted that the first item shows that the merchandise at Sacramento Street at *"landed costs"*, amounted to $132,947.44, and that the merchandise *"obliterated or O o sight"* amounted to $46,139.46. On being questioned concerning this exhibit Hyland said:

> "Yes. I have made notations from various reports of auditors, from which I have been testifying, *and which figures, I may add, I knew to be correct from my own personal investigation."* (Italics ours.) (Vol. I, p. 441.)

When further questioned as to the pricing being on the basis of landed cost, he testified:

"Mr. Thornton. That value of $102,453.23, what value does that represent? Does it represent the replacement cost of that merchandise on October 19?

A. I believe that that represents the landed cost to us. I cannot state positively, as the work was all done by Mr. Sugarman and by Mr. Taylor." (Vol. I, p. 526.)

"Yes, we always pay attention to Calcutta prices. I believe you are correct in your question that there are on file in the individual customs houses the Calcutta prices sent each day by the Consul in Calcutta, but I cannot state positively. At various times, yes, we receive cables and telegrams relative to prices. We very often had cables oftener than once a week. Sometimes every day, probably.

The prices set forth in that proof of loss represented our actual cost, to the best of my recollection. That is to the best of my belief. I don't know that to be an actual fact. I had nothing whatever to do with making that up." (Vol. I, p. 527.)

When he was confronted with the schedule attached to his proof of loss, he testified:

"I cannot state 'whether any of the prices set forth in that schedule represented the actual value on October 19.' " (Vol. I, p. 528.)

"Q. Can you tell us anything about the values which you set forth as to manufactured bags?

A. I did not set forth these values. I can only repeat that Mr. Sugarman and Mr. Taylor handled the entire thing. I personally had nothing whatever to do with it.

Q. Then you could not look at this inventory or at this proof of loss and tell us whether or not the values set forth as to cotton sugar liners, or A.B.S. sacks, or beet pulp sacks, or any of the other sacks included in there, are correct?

A. It is my understanding that they were, or I would not have signed it. The work was left entirely in the hands of Mr. Ben Sugarman and Mr. Taylor.

Q. Did you examine them to see if they were correct?

A. I did not." (Vol. I, p. 529.)

It will be noted that in this testimony he endeavored to hide behind Taylor and Sugarman. It has also been stated he was not at all active during the two or three years before the fire. However, we find him testifying as follows:

"As to what duties I performed on behalf of the Hyland Bag Company during the years of my ownership of it, with particular reference to the three or four years immediately preceding the fire, I personally handled all of the large purchases. To explain that, Mr. Ledgett, who acted as purchasing agent, only handled the small local stuff, the small purchases. The large purchases, consisted of 90 per cent. of all the materials that we were using in our factory and I handled those all. In addition to that, I personally for three or four years prior to the fire, handled every sale that was made there, and the sales would average per year well over $2,000,000.00. So you can well appreciate the fact that in handling all these details that I could not possibly have handled everything else, such as watching the insurance,

doing the bookkeeping, and everything else. It was not possible." (Vol. I, pp. 546-7.)

"I personally handled purchases of burlap and carload lots of sheetings, etc. As to what I am designating as a large purchase—a quarter of a million yards; a quarter of a million yards of cotton sheeting and similar quantities of burlaps. Yes, if there was a purchase to be made involving 100,000 yards of burlap I would personally make that; I handled all of the purchases from Calcutta, all of the Calcutta purchases. Not as a rule did I purchase goods locally. Occasionally when we found ourselves short we might pick up some locally, yes; if Mr. Ledgett was not available at the time I would not handle it. As to that being in one or two bale lots, that would be in smaller quantity lots. It all depends on what we require. Oh, no, not at all would Mr. Ledgett enter into contracts involving 500,000 yards, or more. Any contracts totalling that amount would have been entered into by me personally. Yes, I would be familiar with the prices on those contracts. Yes, sir, I personally handled all sales. I mean by that practically all the sales; there might have been an occasional order brought in by Mr. Ledgett that did not amount to a great deal in volume of dollars. I handled practically all of the sales of the Hyland Bag Company, all of them. I mean all sales of bags, and burlaps, as well. I was familiar with the prices on those sales. Quite so, I would be familiar with the prices as to sales to the American Beet Sugar. I do not endeavor to memorize those things, however. Once a transaction is finished there is no occasion for me to memorize it at all. At that time, October 19th,

yes, I was familiar with those prices. As to whether, as you ask, I had forgotten the October 19th prices upon the 24th day of December, of bags and burlaps, I never try to memorize prices. There was no occasion to do so. We had our price sheets to refer to. They were always there. I do not recall whether I referred to them at the time I signed that proof of loss, except that I can say that that proof of loss, as I have told you dozens of times, all of the detail work on that was handled by Mr. Sugarman and by Mr. Taylor. I had nothing whatever to do with it" (Vol. II, pp. 574-5-6.)

Yet prior to that time he told us:

"As to being familiar with the value of burlap, I am fairly so. *I was familiar with the value on October 19, 1929, and I am today."* (Italics ours.) (Vol. I, p. 526.)

On rebuttal, when he thought he needed evidence to contradict our expert, he professes to know values. (Vol. VI, pp. 3296-7.)

He had already given a number of figures as to values and admitted that these were from the Bemis price list. (Vol. II, p. 576.) In other words, instead of being landed or replacement costs these figures were the prices at which anyone not in the trade could go in and purchase one of five bales of burlap. (Vol. II, p. 577.) In these figures were included the profit that Bemis would have made on a retail sale. He claims that he was not thoroughly familiar with the schedule attached to the proof of loss, nor was he thoroughly familiar with the Radford inventory, he had looked it

over just casually. (Vol. I, p. 446.) Yet, he did appear before a Notary Public and swear to the correctness of the statement. He knew the schedules on the proof of loss were prepared for the purpose of presenting the same to the insurance companies and for the purpose of making claims under the insurance policies. He caused these proofs of loss to be presented to the insurance companies for the purpose of collecting the money. (Vol. I, p. 442.)

When Sugarman was called as a witness for the appellant, he testified:

> "I agreed with Mr. Smith that it should be priced upon the replacement value in San Francisco at the time of the fire, and we agreed that we would add, in determining that cost, a fraction of a cent, I cannot remember at this time what that fraction was, to take care of cables, and other overhead that went into the purchase of this merchandise." (Vol. II, p. 980.)
>
> "Answering your question, it is possible that it was one-half cent over the five-bale price, but I am not positive. *I want to correct that, there was no discussion as to a five-bale price with Mr. Smith. No, there was no discussion with Smith on the five-bale price.* There was a discussion with Mr. Smith for the addition of a fraction of a cent over the market price with particular reference to cables and other expenses that we specially referred to. Yes, cables were referred to as the reason why that fraction of a cent would be allowed over and above the market price. Cables and other things were referred to." (Italics ours.) (Vol. II, pp. 980, 981.)

He further states:

"I had nothing to do with the pricing of this inventory, that is the unit cost of burlap or of bags, only in so far as I conveyed to Hyland the result of my discussions with Smith, and Hyland showing me the Bemis price list. Mr. Hyland showed me that, yes. I don't know whether he produced it from his files, but he showed it to me in his office. I did not instruct him to price that on the five-bale lot list appearing on those Bemis price lists, but I advised him that I thought that would be the proper method of pricing it." (Vol. II, p. 1004.)

"After the Radford inventory was returned to me with certain prices on it, I did not check over those prices, either as against that Bemis price list or as against landed costs. I had no knowledge as to whether that price list was based on a higher figure than on one-bale-lot cost in the Bemis list. *I had no knowledge of Hyland's landed cost.* I don't know that Mr. Hyland was not a retail buyer. I knew he was a buyer of a lot of burlap. I knew he was buying in India because I took up the question of telegrams and cables. I knew that he was a big buyer of burlap. Yes, I accepted the figures as given to me by the Hyland Bag Company and extended those figures and incorporated them in the schedule in the proof of loss, of course I also knew that as to some of that merchandise he perhaps could not have replaced it at the time of the fire without going to foreign markets. Yes, I made inquiry about that, I asked Mr. Hyland about one item. No, sir, I did not inquire from Bemis or from Ames-Harris if they had large stocks on hand. As to inquiring from

Bemis or from Ames-Harris as to landed costs, *I inquired of no one as to landed costs.*" (Italics ours.) (Vol. II, pp. 1005-6.)

Smith says:

"Sugarman brought this schedule into my office and told me that he had the prices filled in on the inventory, and wanted me to go to the Baker-Bauer Warehouse and down to Sacramento street, and go over the stock with him and Mr. Hyland for the purpose of making an adjustment. He said that this was what the merchandise was priced at by Mr. Hyland. I asked him what information he could give me to support those prices. I asked him if he had any quotations which Mr. Hyland had received with the date of the bill which would verify these prices. I told him that I was entitled to that information. He told me that I was not entitled to that information, that Mr. Hyland would have to show me all his prices to verify these prices, or else they would have to be changed. We could not agree on the prices, and he could not give me the supporting information that I required on the prices." (Vol. V, p. 2706.)

"They filed the proofs of loss about the 24th or 25th of December, as I recall it. It was a short time before that. They were in my office. *I asked Mr. Hyland at that time how he fixed the prices on that schedule.* He told me that those were from telegrams that he received quoting prices, and they were in code, and he deciphered them properly. I asked him if he did not think it the proper thing to let me have the key to the telegrams, and let me make comparisons on those, so I would have something to check on; I ex-

plained to him at the time that I had been unable to get price verifications from other burlap brokers or other dealers, they were somewhat reluctant about giving me prices; I told him I would have to make some check on it before I could agree to any value. He told me that those were his private affairs, and that was all the information I could have on that subject. *I also asked him at that time if he was satisfied with the grades as well as the prices that he had given me, and he told me that he was, and that I would find that those were 100 per cent right."* (Italics ours.) (Vol. V, p. 2754.)

"I said, 'If you file a proof of loss and you set up incorrect grades or incorrect quantities, or incorrect prices, and swear that those are the correct prices, you will vitiate your policy contract, and by the terms of the contract you might lose all your insurance.' I said, 'I want to warn you of that.' I said, 'I have called Mr. Sugarman's attention to that, and I want you to know that I told him about it.' I addressed that conversation to Mr. Hyland. Mr. Hyland was a little bit peeved at that and said, 'We will take all the chances on that.' Sugarman said, 'You don't need to worry about that, R. V., we will take all the chances on that, we will attend to that.' " (Vol. V, p. 2755.)

"So that it was after the inventory was completed by Mr. Radford and the items of the inventory were priced that you first had a discussion with Mr. Sugarman on the matter of the addition of one-half a cent per yard on the various items?

A. Yes. In that respect he explained that Mr. Hyland had an office in New York, and I under-

stand that he maintained a clerk or a buyer there, and there were telegrams exchanged between that office and this office, and purchases were made through that agency, and by maintaining that office Mr. Hyland was able to buy cheaper than he could buy here, transacting business here, as the other dealers did, and that gave him an edge on the other dealers. And Mr. Sugarman said that I would not be entitled to that price of Mr. Hyland's, which was through his purchasing power, and I said I would be entitled to his purchasing power—I said the insurance company would be entitled to figure on the loss of what it would cost the insured to replace the merchandise, and I said we did not want the services of his buyer or his organization for nothing, I said, whatever proportion of expense of maintaining that office should be allotted to this quantity of merchandise, that amount could be added as a buying cost, that is, cost of buying is part of the cost of the merchandise, I explained that to Mr. Sugarman, and he thought it would be half a cent a yard, and I told him I thought it would be an unreasonable amount, I said, 'Whatever it is we would be glad to add that,' but we did not agree on it. And, besides, he would not give me the price which Mr. Hyland bought at, he would not give me his low-down prices." (Vol. V, pp. 2815-2816.)

Again we want to call the court's attention to the fact that while Smith did represent some of the appellees, that there is no attempt to show any conversation with any other adjusters.

C. T. Young, who was the superintendent and assistant to the manager of Bemis Bag Company, testified that they made up price lists which were sent to the trade. That on this list there were two prices, from 1 to 5 bales, and 5 bales or over. For 5 bales or over the price would be ¼¢ per yard less. (Vol. IV, p. 2208.) He also stated that an outsider not engaged in the burlap business could come into the plant and purchase 5 bales at that price, that they were willing to give it to anyone who came in and took 5 bales of burlap. (Vol. IV, p. 2209.) He also testified that the trend of the market during 1929 was downward, and has been consistently so ever since. These lists were made up as a guide to the salesmen who could immediately give a discount of ¼¢ a yard on a sale of 5 bales or more. (Vol. IV, p. 2218.)

He further testifies:

> "Regarding having said that I hardly thought Mr. Hyland would have assumed the 5-bale price list as what he would have had to pay for large quantities, and explaining that, generally speaking, this list that has been submitted is more or less what you might call a retail trade list, although we do not have any such term as retail trade. It is made up particularly for very small purchases. Anything that gets to any quantity, even as low as 25,000 yards, we would not consider that list, at all, and I hardly think anyone in the burlap manufacturing business would consider that list. Yes, 'in other words that is general information to the trade'. I would consider it so. Mr. Hyland has been in this business a

number of years, yes. I believe Mr. Hyland was supposed to be a very good buyer."

*　　*　　*　　*　　*　　*　　*

"As to explaining that in making sales in cases of the five bales we would not have considered the price list, merely that we would feel that list would have been too high to have secured any business, therefore we would not have taken that list into consideration had we been desirous of securing a particular order that we quoted on. *As to, then anything in 25,000 yards or up there would have been a reduction from that price list, there would have been.* (Over objection): *As to, would that have been a material reduction, yes, we would have made a material reduction from this price list.*" (Vol. IV, pp. 2227-2228.)

He also stated that they were carrying large stocks in October, 1929, and would have been very glad to have made large sales of burlap at that time. (Vol. IV, pp. 2232-2233.)

He also testified:

"Yes, the selling price that I read off from that sheet of September 30, 1929, was a one-bale selling price. From that there would be deducted at least one -quarter of a cent on five-bale lots. Might I further amplify that, that even at that time if we had an inquiry for five bales, I believe there were verbal instructions to our salesmen to take it up with the salesmanager or the manager for prices; in other words, we may not have adhered strictly to the quarter of a cent reduction, we might have made more." (Vol. IV, pp. 2238-2239.)

We also called Alexander Logie, who had been engaged in the burlap business for over fifty years in Scotland, New York, India and San Francisco. He produced a list of prices of burlap which was introduced in evidence as Plaintiff's Exhibit 137. (Vol. IV, p. 2175.) In this connection he stated:

> "As for saying that these prices that I have quoted in this list (Exhibit No. 137) would be the precise prices at which I would have sold these products to Mr. Hyland on October 19 or 21, 1929, these prices on the list that I have given you are the landed price ex dock, duty paid, including insurance, that Mr. Hyland would probably have had to pay." (Vol. IV, p. 2181.)

As we have pointed out, appellant was not satisfied to attempt to recover ½¢ in excess of the price at which anybody not in the trade could have purchased this burlap, locally and at retail prices, he had to increase the quality of the burlap from 36-8 to 36-9 and 40-8 to 40-10, thereby adding another $6175.06 to the alleged value of this burlap. With all his knowledge of purchases and sales he was still willing to swear to the truth of these figures and present them to these insurance companies for the purpose of collecting a fraudulent claim.

In order that the court may more readily grasp the significance of these prices, we have prepared a tabulation which is set forth below, showing a comparison of values as set up in the proofs of loss and as testified to by Mr. Logie and Mr. Griffits.

In the Bemis list, as presented by Mr. Griffits, there is a slight range in price, and we have invariably taken the higher. He states:

> "The amount of profit we would add would vary, perhaps, I would say, from 1 to 5 per cent. Yes, from 1 to 5 per cent over these prices I have just given you. Yes, when I say 'large quantities' I mean in excess of 25,000 yards." (Vol. IV, p. 2254.)

Kind of Material	Values		
	As per Proof of Loss	Logie	Bemis Bag
31/15	.13⅜	.0975	.0928
36/8	.07¼	.0575	.0549
36/9	.07⅞	.0640	.0619
36/10	.08¾	.07	.0691
37/10	.09	.072	.0702
40/8	.08⅛	.0625	.0589
40/10	.09⅝	.077	.0761
45/7½	.09⅛	.0695	
45/8	.09¼	.071	.0684
40/12	.11¾	.092	.0826
54/8	.11⅛	.086	

We have already pointed out in appellant's testimony that he personally handled all sales, yet we find he swore to a proof of loss setting up value of A. B. S. bags incomplete at $199.65, and yet their net price of those same bags complete, and with liners, was $169.00, or a difference of $30.65 per thousand. (Vol. III, p. 1628.) Other bags were similarly marked up.

AS TO THE NEWHALL "FICTITIOUS CONTRACTS".

It will be noted that in and by each of the contracts of insurance which were introduced in evidence, and which are the California Standard form of fire insurance policy, it was and is provided:

> "The company will not be liable beyond the actual cash value of the interest of the insured in the property *at the time of loss or damage, nor exceeding what it would then cost the insured to repair or replace the same with material of like kind or quality.*" (Italics ours.) (Vol. I, p. 295.)

There had come into our possession a document entitled "Hyland Bag Company, Proposed Merchandise Purchases for Period October 19 to December 31, 1929". This document purported to set forth certain purchases from H. M. Newhall & Co., under dates varying from June 20 to August 20, 1929, of 2,400,000 yards of various types of burlap to arrive in San Francisco from October 15 to November 15, 1929. The landed cost varied materially from the claim as set forth in the schedule attached to the proof of loss. For purposes of comparison, we have prepared a table which is set forth below:

Type of Burlap	Value as Per Proof of Loss	Landed Cost as per Exhibit HH
31-15	.13375	$.0925
45-7½	.09125	.07448
40-12	.1175	.1060
36-9	.07875	.06598
37-10	.09	.07725
40-10	.09625	.08697
Cotton		
36-6.15	.07125	.0553

These contracts were first called to the witness' attention on his original cross-examination, after he had testified to Bemis Bros. Bag Company's 5-bale price as being replacement value as of October 19th. This examination covered pages 579 to 584, and it will be noted that the witness was very evasive. At that time we demanded production of these contracts as they were the only positive evidence that we had been able to obtain up to that time showing overpricing. This witness was recalled by appellant and stated he had made a search for these contracts, but had been unable to find them. Mr. Schmulowitz stated he would stipulate as to the material facts of these contracts and would try to get copies from H. M. Newhall & Co. (Vol. III, p. 1643.)

At the commencement of the cross-examination of the witness D. A. Parker, Mr. Schmulowitz was asked if he was prepared to produce these contracts. He replied that he would stipulate to their contents. (Vol. III, p. 1676.) Parker testified that he had turned these contracts over to Mr. Lilly, of Pace, Gore & McLaren. (Vol. III, p. 1677.)

Pursuant to Mr. Schmulowitz' agreement that we might ask Mr. Lilly for these contracts, we got in touch with Mr. Lilly, who advised us that these contracts had never been in his possession. We so advised court and counsel. Mr. Parker was then put on the stand on rebuttal and testified that Mr. Milner, a representative of Mr. Lilly's office, had come to see him in connection with this matter, had examined and checked these documents, and on leaving had taken some documents with him. That that was the

last time Parker remembered seeing the contracts. (Vol. VI, p. 3311.)

The only witness called by us on surrebuttal was G. E. Milner, a public accountant associated with Pace, Gore & McLaren, who testified that at Mr. Lilly's direction he had gone to the office of Parker at Hyland's office, in the fall of 1930, to check certain documents, that *he was not requested to check these contracts, did not examine them, and did not take them with him.* (Vol. VI, p. 3379.)

We had already discovered that Colbert was on the payroll of Hyland in September, 1929. We had also discovered that there was further evidence of the dealings between appellant and Colbert, as evidenced by Journal Entry No. 897, which was introduced as Defendants' Exhibit JJ. (Vol. IV, p. 1729.) It will be noted that this is one place where appellant cannot claim to have no personal knowledge of his books, as it is the only entry which is personally signed by Richard C. Hyland. It shows that George P. Colbert, an employee of H. M. Newhall & Co., and the man appointed by appellant as his competent and disinterested appraiser, received commissions from Hyland for purchase of burlap from Newhall. These purchases, as indicated by the contract number, are the 350,000 yards actually received after the fire, and the 100,000 yards actually sold by Newhall in December, 1928, the contract being cancelled and a new invoice made at a lower price under date of June 20th, although the goods had been received and used prior to that time. In addition to receiving commissions on these sales, Colbert was given a portion of

the amount of the refund to Newhall, received as the result of the cancellation of this contract and purported resale at a lower price, which was put through in this journal entry as a credit for inferior burlap.

As a result of this discovery, Colbert was recalled. This witness testified that about November, after the fire, he had a conversation at Hyland's office. (Vol. IV, p. 1570.) Hyland asked him to prepare certain contracts, which could be cancelled, on which he could predicate the value at which goods could be replaced in making up his proof of loss. (Vol. IV, p. 1751.) He furnished Hyland with blanks to make up these contracts, and the contracts were made up but he did not get any copy of them. Hyland prepared a letter to H. M. Newhall & Co., handing him the original, which, as the contracts were null and void did not represent actual sales, he destroyed and never put in the file. These contracts were signed H. M. Newhall & Co., by Geo. P. Colbert, and were left with Mr. Hyland. (Vol. IV, p. 1752.) He had no authority to sign any contracts. On examination by Mr. Schmulowitz, he testified:

> "Within the last few weeks Mr. Hyland telephoned to me and asked me to revise the figures on these old contracts and I supplied him with new forms and the contracts were signed and they were automatically cancelled in my presence by Mr. Hyland. Yes, within the last few weeks. I could not say whether those copies of those contracts were the counterparts of these numbers, I never checked the contracts back, I never was given copies of the contracts, because I never

> placed any value on the contracts, as of no consequence in connection with H. M. Newhall & Co." (Vol. IV, p. 1766.)

He also identified a copy of a letter dated October 22, 1929, and received in evidence as Plaintiff's Exhibit 119 (Vol. IV, p. 1771) as a copy of the letter addressed to H. M. Newhall & Co., attention Mr. Colbert, by Hyland. It will be noted that this letter asked Colbert to dispose of the merchandise represented under these "fictitious contracts", but expressed his desire to retain bona fide contracts which were held with Newhall. Appellant then also introduced in evidence letters from H. M. Newhall & Co., signed by Geo. A. Newhall, Jr., calling the attention of appellant to the fact that certain contracts with H. M. Newhall had not been signed and returned to them. (Plaintiff's Exhibit 120, Vol. IV, p. 1776, Plaintiff's Exhibit 121, Vol. IV, p. 1785.) On recross examination, however, it was stipulated that the numbers of the fictitious contracts did not appear in these two exhibits. Colbert also testifies:

> "As to having stated that subsequently, within the last two or three weeks, *I had prepared other contracts for Mr. Hyland,* I don't know exactly the date, but it was *probably three or four weeks ago.* I think it was since the trial started, yes, I am quite sure it was. *This trial started October 13, yes, it was after that date.* Yes, I said they were also prepared by Mr. Hyland. Yes, I signed them 'H. M. Newhall & Co.' by myself. No, *they did not represent any actual sales of burlap. Yes, they were also fictitious contracts.*

The Court. These contracts mentioned in HH are fictitious contracts?

A. They were contracts, Judge, that were prepared, as I said in my testimony, to show prices only. That was what they were to be used for, prices at which——

Q. (interrupting). Still they were fictitious?

A. They were fictitious.

Q. Have you just testified that there were other contracts which were fictitious?

A. Yes.

Mr. Thornton. *They were prepared by Mr. Hyland and signed by you since the starting of the trial of this case?*

A. *Yes, I don't know the exact date, but it was since this trial started.*

* * * * * * *

The Court. Yes. Q. Are those contracts numbered, the contracts made since the trial commenced?

A. I don't know, your Honor, whether they were numbered or not, they were given for the same purposes as those were given; whether they had numbers on them I could not say positively." (Italics ours.) (Vol. IV, pp. 1800-1801.)

Mr. Almer Newhall was then called as a witness and was shown Plaintiff's Exhibit 122, which is identically the same as Defendants' Exhibit HH. He testified:

"A. There are no contracts shown on this page that are contracts to which H. M. Newhall & Co. is a party, and there were no such cancelled contracts. We made no such sales.

That is correct, in other words, H. M. Newhall & Co. made no contracts bearing the contract num-

bers, the dates of the contracts as they appear on this sheet. No, H. M. Newhall & Co. did not make any contracts with the Hyland Bag Company or Richard C. Hyland covering burlap of the description set forth on this sheet for shipment or for delivery on the date set forth in Plaintiff's Exhibit 122. No, there were not any contracts between H. M. Newhall & Co. and Hyland Bag Company cancelled after the fire of October 19, 1929. I have at your request examined my books to ascertain what the contracts bearing these numbers actually represent. I have brought the original contracts here in a suitcase and would like to have the suitcase." (Vol. IV, pp. 2079-2080.)

He produced a summary of the books of H. M. Newhall & Co. which was introduced as Defendants' Exhibit NN. (Vol. IV, p. 2081.) The gist of this report covering these fictitious contracts is as follows:

Newhall contract 1449 was actually dated August 22nd and covered a sale of 1000 bales of raw jute to the California State Prison at San Quentin. Contract 1541 was a sale of 25 cases of abalone to Sumatra. Contract 1542 was for the sale of 100 bales of California cotton to Japan. Contract 1578 was a sale to the Pacific Bag Company of 400,000 yards of burlap. Contract 1593 was for the sale of 36 bags of tapioca to Standard Grocery Co. Contract 1602 covered the sale of 25 bales of 40-10 burlap to the Pacific Bag Company. (Vol. IV, p. 2082.)

On cross-examination this witness produced the contract books. (Vol. IV, pp. 2130-31.) It appears that these records were numbered when they were printed

from 1 to 10,000. (Vol. IV, p. 2144.) There had been no changes or alterations in these sales registers and the contracts followed in their regular number. The register does not indicate any changes or erasures. (Vol. IV, pp. 2049-2050.)

AS TO OTHER FALSE SWEARING BY APPELLANT DURING THE COURSE OF THE TRIAL.

Appellant was recalled on rebuttal and categorically denied all testimony which had been given adverse to him. But to show the boldness of this witness, his absolute disregard for the truth and his readiness and willingness to commit perjury under any and all circumstances, we desire to call the court's attention to Exhibit 165 (shown in Volume 6, p. 3258), introduced while he was testifying on rebuttal. In the first place, this exhibit admits our contentions that 36-8 and 40-8 burlap were listed and priced as 36-9 and 40-10 burlap. He also made another admission for which we contended throughout the trial, namely, that 42,880 pounds of burlap bale covers included in his claim as lot No. 403, of a value of $2572, were really only 8880 pounds. (This is another over-statement of $2039.20, according to his own admission, although we have not taken the time of the court to discuss this item.) In this exhibit, which, by the way, is in the form of a letter addressed by appellant to his atorney, under date of January 2, 1932, he first sets up his proof of loss figures and shows the result, after claiming to have made a correction for the improper classi-

fication of burlap and the improper weight of burlap bale covers. He then sets up a figure purporting to show his loss based on Logie's prices, also showing a correction for the erroneous prices. He then sets up a figure purporting to be based on New York prices, concerning which we had introduced evidence, and makes the correction. He then sets up another figure supposedly based on New York prices, plus freight to San Francisco. He then sets up a figure supposedly based on Bemis prices. He then testifies that he has refigured these items on the basis of the values as testified to by these parties and that his loss is represented by this exhibit. *To say that the temerity of this witness in producing this exhibit is astounding is to express it mildly.* This is particularly true in view of the length of this trial and what we considered a rather thorough cross-examination of the various witnesses. On cross-examination, Mr. Hyland could not remember any of the figures upon which he based his Exhibit No. 165. He could not explain how there was a difference of only $2821 supposedly based on New York prices and the figures in the proof of loss, although there was a differential from 2¢ to 4¢ a yard covering several hundred thousand yards of burlap. (Vol. VI, p. 3294.) Although he had been in court when Taylor testified that their proof of loss claimed $30 a thousand more than the actual selling price for A.B.S. bags, he had given no effect to this in his exhibit because he stated that our witnesses did not testify as to bags. (Vol. VI, p. 3295.) He stated:

> "I have not attempted to check this statement up, Mr. Thornton. No, I did not think it neces-

> sary to bring my work sheets to check this. As for knowing I would be cross-examined in regard to them, *I did not anticipate a cross-examination of this length.* (Mr. Thornton. Q. I do not think you did.) Or I would have brought them." (Italics ours.) (Vol. VI, p. 3296.)

He then made a very interesting admission for a man who has been constantly trying to hide behind his bookkeeper and his adjuster.

> "I certainly was in court when Mr. Griffits testified. * * * I heard Mr. Griffits testify as to prices and *I am just as well qualified as Mr. Griffits. As for my knowing prices and being qualified: I know the burlap market, and I know what Mr. Griffits' organization always did, and what they have been doing for twenty-five years."* (Italics ours.) (Vol. VI, pp. 3296-3297.)

And yet this man has always expressed ignorance of values and could not give any values even during this cross-examination. In the afternoon he brought his work sheets which were introduced as Defendants' Exhibit EE. (Vol. VI, pp. 3303 to 3310.) We shall not unnecessarily prolong this brief by quoting this cross-examination in full, although it more clearly than any other part of the record shows the character of this man. The sheets on which he did the actual figuring he had thrown away, according to his testimony. He then wants to explain a "little misstatement" that he had made in his direct examination, as he stated "unintentionally". Although he had testified that he had figured the various items in the proof

of loss and had arrived at a total of $83,514.54 as per Logie, as a matter of fact he merely picked out certain items and applied what he considered to be Logie's figures, using the proof of loss figures for the balance of the inventory, having Taylor check on three particular items, 36-8 burlap, 40-8 burlap and bale covers. This, of course, was patent on the face of Exhibit 165. As a matter of fact, the only items figured on Logie's prices out of the total of $86,807.98 consisted of ten items involving only $12,461.81. This same thing appears true as to the so-called New York prices and the so-called Bemis prices. Is it any wonder that in his opinion, the court states:

> "The evidence in this case shows that the overvaluation resulted from no such inadvertence but from an intentionally fraudulent attempt to get an excessive award from the insurance companies." (Vol. I, p. 180.)
>
> "Plaintiff attempts to avoid responsibility for any overvaluation on the ground that proofs of loss and the foundations for the claims sued for in this action were prepared by his bookkeeper and accountants hired by him and that he merely signed what was presented to him. I believe the evidence shows that such was not the fact—*that plaintiff knew what was in his factory and that his claim of loss was overvalued.*" (Italics ours.) (Vol. I, p. 181.)

Is it any wonder that the court, even though reluctantly, finds that plaintiff was guilty of fraud and false swearing? Is it any wonder that, upon motion for new trial based partially on the ground that the

court had not found that this fraud and false swearing was intentional, the court states:

> "In order to avoid any possible misunderstanding, I find that plaintiff was guilty of wilful and intentional fraud and false swearing in making his proofs of loss." (Vol. I, p. 233.)

Truly, the preparation of this Exhibit No. 165 was just as bold and just as amateurish as the attempted burning of this plant.

AS TO THE AUCTION SALE.

Evidence was introduced at the trial, over our objection, relative to an auction sale held on April 22, 1930, and relative to the amount received. The trustee of that sale was W. H. Metson, who appears as of counsel for appellant. The auctioneer was Ben Sugarman, the adjuster for Hyland. By appellant's own admissions, the difference in the value of any burlap between October 19, 1929, and the date of the auction sale, April 22, 1930, was on the later date 16% lower. The court will recognize that the amount realized at a forced sale, or at an auction sale, is no criterion of value. This is particularly true on a falling market where there has admittedly been a decline of 16% in values in a period of six months. Had we attempted to prove the values in the Hyland plant as of the date of the fire by taking the figures realized at this auction sale, on each of the types of material, counsel would have promptly, vigorously and properly objected. Nevertheless, appellant attempts to prove damage to goods

taken from these premises by showing that a certain amount was realized at an auction sale.

Conducted as this sale was, it still shows that there was a remarkably small amount of damage to these goods. According to Mr. Smith's figures, Exhibit UUU, (Vol. V, p. 2723) the actual value of these goods amounted to $66,626.05. He further states, as we have already pointed out, that this value is high as he did not have the correct unit values which were later proved through Logie and Griffits. But, even accepting his figures, we find that applying appellant's 16% drop in value, these goods were worth on the day of the auction only $55,965.82. Even at that they were sold for approximately $38,000. From this appellant deducted auctioneer's fees and other expenses and endeavored to persuade the trial court that these fees and expenses were a portion of the damage suffered by reason of this fire.

An interesting thing in this connection, and one which may account for the fact that this burlap did not bring an even higher price, is that we find that when this merchandise was first moved from Sacramento Street to the Green Street warehouse, the damaged merchandise was segregated from the undamaged.

Sugarman, Hyland's adjuster, and later his auctioneer, mingled these goods. Radford testifies:

> "Mr. Sugarman didn't tell me to move some of the damaged material in with the good material, indicating that it might serve to bring a larger price at an auction sale, *he just moved it in there.*

He moved it in and he told me that was his reason." (Italics ours.) (Vol. V, p. 2581.)

" 'Well, I had received instructions from Mr. Smith of just how he wanted that merchandise placed in the building, that he wanted, as I explained, the good and bad separated. I noticed when I went down there in the morning, I don't know how to state this, but I mean I returned there one morning and found that various flats of the damaged sacks and sugar liners had been moved over among the good merchandise; in other words, apparently good piles of sacks had been taken out of their place and the damaged merchandise sprinkled amongst it, that is, the flats.

Q. Did you ascertain who did that, or under whose directions it was done?

A. Yes, I did. *Ben Sugarman said that he had made the change in the merchandise,* that he had placed the damaged among the good for this reason, that he said in his experience conducting salvage sales, that if he sprinkled in a little bad with the good, that the psychology of it was, he thought, that it would bring more money'." (Italics ours.) (Vol. V, pp. 2602-3.)

Smith testifies:

"Q. Do you know whether there was such a segregation at the Baker-Bauer Warehouse?

A. Yes. My orders were partially carried out. They had it lined out the way I wanted it at one time, and then Ben Sugarman re-arranged it; he put some of the fire-damaged stuff in with the other merchandise.

Yes, I did have a conversation with him relative to that. I told him it was our understanding that it was to be segregated. He gave me his reason.

He said he thought it would be better in case they wanted to sell it, it would bring more money if you made it look like damaged merchandise." (Italics ours.) (Vol. V, p. 2704.)

Yes, Mr. Hyland and I did have a discussion upon the subject of Mr. Hyland's disposition of the salvaged merchandise. Mr. Hyland told me that he thought that he could sell that stuff, and get $40,000, $45,000, or maybe $50,000 for it on a five per cent commission and *I told him,* as I had told him on all other occasions, *I had nothing to do with it, it was not my merchandise,* he could sell it for $40,000 or $50,000, of course if he did not have use for it he could go ahead and sell it; *I also told him that did not have anything to do with the amount of loss, what he sold it for, because I said, 'If you want to sell good merchandise at a sacrifice, that is a matter for your own consideration and not a matter of the insurance companies' protection,'* and the most of the merchandise, I will say 75 or 80 per cent of the merchandise which was comprised in the inventory could have been run through the factory in the regular course, that is, Hyland would not have had any loss on that portion, and there was no reason why it should be sold at a sacrifice. * * *" (Italics ours.) (Vol. V, p. 2808.)

Smith was also informed by buyers at this sale that the grades of merchandise were wrong. (Vol. V, p. 2837.)

On cross-examination Sugarman admitted another reason:

"At the time of the sale I believe there were new lot numbers used, not the Radford lot num-

bers. The tags bearing the Radford numbers had not been removed. I am positive of that. The list as supplied to some of the bidders was by Radford number; originally we showed them copies of the Radford inventory, showed them to the bidders, but we sold on a different basis." (Vol. II, p. 1019.)

We then showed him a list which was received in evidence as Defendants' Exhibit Q (Vol. II, p. 1021), showing that all of the Radford lot numbers had been changed at the auction sale.

This court will probably wonder why an auction sale was held. The answer may point directly to the reason for the fire and the type of fire that we found occurring on October 19, 1929, at the plant of the Hyland Bag Company. Within two or three days after the fire Sugarman told Smith that Hyland wanted to get out of the bag business, that Sugarman had fixed up a merger. (Vol. V, p. 2687.) Hyland said the same thing. (Vol. V, p. 2857.) We find that as a matter of fact, before this auction sale Hyland had sold to Pacific Bag Company his entire business of manufacturing domestic bags, and that Hyland himself, prior to this auction, had been employed as General Manager of Pacific Bag Company. (Vol. I, p. 520.) We have also shown that the machinery of the Hyland Bag Company was sold to Pacific Bag Company and removed to their plant. (Vol. IV, p. 2075.) As we have already pointed out, the court visited the premises of the Pacific Bag Company on Monday, January 18, 1932, and saw this machinery. (Vol. VI, p. 3379.)

The mere fact that this appellant, long after his claim against these insurance companies had matured, and after a drop in the market of 15%, elected to sell merchandise 75 to 80% of which was absolutely undamaged, and for which he had no further use due to the sale of his manufacturing business, cannot be considered as proving, or tending to prove the damage sustained to this material by reason of the fire.

AS TO THE POLICY OF INSURANCE OF THIS APPELLEE.

Prior to August 1st the Hyland Bag Company was carrying the $50,000 of underlying or primary insurance involved in this litigation. On August 1st an additional $50,000 was procured from this appellee. In and by that policy it was provided

> "The amount of insurance under this policy is provisional and attaches at all times in excess of $50,000." (Vol. I, p. 343.)

In other words, it was agreed that when the value of the stock exceeded $50,000, this policy would immediately attach, subject, however, to other qualifying conditions of the contract. As to the meaning of the word "provisional," we find in the form a definition of that term as used in the contract. (Vol. I, p. 345.) It is stated that it is for the purpose of defining the premium, that if the actual premium should be more than the deposit, the insured would be required to pay the difference, if less, the company must refund the difference. In other words, appellant was to pay only for the portion of the policy that was actually used. It is further provided:

"It is understood and agreed that this insurance shall attach *only* to the extent of the difference between the amount of all other specific insurance upon the property described herein and 90% of the actual cash value thereof; and the amount so arrived at shall be the basis of contribution with all other insurance in the event of loss, but in no event shall the liability of this company exceed the amount for which this policy is written." (Vol. I, p. 344.)

In other words, it was specifically agreed by and between appellant and this appellee that while this policy of insurance was to attach immediately upon the value of the stock exceeding $50,000, it was to attach only to the extent of the difference between the amount of all other specific insurance and 90% of the actual cash value.

If, for the sake of argument, we consider that the actual cash value was $130,000, 90% of that value would be $118,800. In addition to this excess policy of this appellee there was $135,000 of specific insurance. We therefore find that there could have been no "difference between the amount of all other specific insurance upon the property described herein and 90% of the actual cash value thereof." In other words, there could be no difference as against which the policy of this appellee could apply and there would be no basis for contribution as provided in the policy.

If, on the other hand, the actual value of the stock was as is set forth in Exhibit UUU, $66,626.05, 90% would be less than $60,000. It would, of course, be farcical to contend that, if there was only that amount

of loss with $135,000 of specific insurance, any liability or any contribution of this appellee is involved in this case.

It is further provided in the policy,

> "If in the event of loss claim does not exceed $50,000, it is understood and agreed that there shall be no insurance effective hereunder." (Vol. I, p. 344.)

If we have convinced this court, and we do not see how we could have failed so to do, that the actual loss sustained by appellant was less than $50,000, this provision of the policy absolutely eliminates this appellee, and the judgment in its favor should be sustained regardless of any other defense which it may have interposed. It will probably be contended that the proof of loss submitted by appellant is in excess of $73,000. By no stretch of the imagination can it be held that, because an insured deliberately exaggerates the amount of loss he sustains, a company which has in its policy a provision such as was last quoted can be forced to contribute.

Attorneys for appellant called as a witness one Wallace B. McLaren, an insurance broker who at the time of the issuance of this policy, was one of the general agents for this appellee. This party was not called as an adverse witness, but we also objected to his testimony under the decisions of this court, which were called to the attention of the trial court, namely,

> *Fidelity Union Fire Ins. Co. v. Kelleher,* 13 F. (2d) 745;
>
> *Northwestern National v. McFarlane,* 50 F. (2d) 539.

Nevertheless, the attorney for appellant insisted upon bringing out the intention of the parties relative to this policy.

McLaren testified:

> "There is a policy condition in this form that any underwriter having any experience whatsoever would say it constituted a joker. Under my policy I received the same rate that other companies had, and yet, under their policy, if there was a loss of $10,000 or 10 cents they had to pay a proportion of that loss and *yet under my policy, receiving the same rate that they received, the loss had to exceed $50,000.* I felt at the time that with such a joker like that I should not have charged as much as I did, and I was looking out for the interest of my company. Therefore, to me, they received something in the form of a contract that was a most acceptable contract." (Italics ours). (Vol. II, p. 1086.)

It will be noted that on the 11th day of January, 1930, this appellee, by and through its adjuster, after having received on December 26, 1929, the proofs of loss, disclaimed any liability whatsoever under this policy of insurance. (Exhibit 60, Vol. I, p. 409.)

AS TO THE LAW OF THE CASE.

AS TO CONSTRUCTION OF POLICIES OF INSURANCE.

The well settled rule of the Federal Courts is that the terms of the policy are the measure of the liability of the insurer, and that to recover the insured must prove that he is within those terms. The court will not

consider the reasons for the conditions or provisions of the policy. It is enough that the parties have made certain terms and conditions. The courts may not make a contract for the parties but simply enforce the one actually made.

Imperial v. Coos County, 141 U. S. 452;
Fidelity Union Fire Ins. v. Kelleher, 13 F. (2d) 745 (C. C. A. 9).

It is equally well settled that the terms of the contract may not be established or altered by parol evidence, nor can the court take a shortcut to reformation by striking out a clause of the contract.

Northwestern National Ins. Co. v. McFarlane, 50 F. (2d) 539 (C. C. A. 9);
Fidelity Union Fire Ins. v. Kelleher, supra.

AS TO EXCESS INSURANCE.

This court has uniformly upheld contracts of insurance in the form agreed to by the parties. Excess insurance is equally well known and provisions to the effect that the policy would not take effect except as to that portion of the loss exceeding the amount specified in the policy, and that the insurer was not liable where the loss proved was less than the amount specified, have been sustained.

Guttner v. Switzerland Gen. Ins. Co., 32 F. (2d) 700.

AS TO THE MEASURE OF RECOVERY.

The insurance companies, of course, are not liable in any amount unless damage has actually been sustained to the property by reason of fire. This is well recognized by the Federal Courts.

> *North River Ins. Co. v. Clark,* 80 F. (2d) 202 (C. C. A. 9).

In and by the policies of insurance issued to appellant, it was and is provided:

> "The company will not be liable beyond the actual cash value of the interest of the insured in the property at the time of loss or damage nor exceeding what it would then cost the insured to repair or replace the same with material of like kind and quality." (Vol. I, p. 342.)

While this subject has been considered many times, a recent decision of the United States Supreme Court is interesting. In this case the railroad company delivered coal at Minneapolis, and there was a shortage in the delivery. Such coal could be purchased and delivered at Minneapolis at $5.50 a ton, plus freight, whereas the market price in Minneapolis for like coal sold at retail was $13.00 per ton. In the first trial the District Court gave judgment for the wholesale value of $5.50. This judgment was reversed by the Circuit Court of Appeals and upon retrial the District Court gave judgment for the retail value, which was affirmed by the Circuit Court of Appeals. The Supreme Court of the United States reversed this decision and stated:

> "The test of the market value is at best but a convenient means of getting at the loss suffered.

> It may be discarded and other more accurate means resorted to if, for special reason, it is not exact or otherwise not applicable."
>
> *Ill. Central R. R. v. Crale*, 281 U. S. 57.

AS TO FRAUD AND FALSE SWEARING.

The policies of insurance involved in this action are the Standard Form required by the laws of California, and were adopted in 1909. (General Laws 1909, p. 509.) The provisions of the policy are those adopted by the legislature of this state, are mandatory and are binding on both the assured and the insurer. The policy provides:

> "Matters Avoiding Policy. This entire policy shall be void, (a) if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or, (b) in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

As a further expression of its intentions and the meaning of this provision, the legislature adopted Section 549 of the Penal Code, which reads as follows:

> "Sec. 549. Preparing, etc., false proof of loss. Every person who presents or causes to be presented any false or fraudulent claim or any proof in support of any such claim, upon any contract or policy of insurance or indemnity whatsoever for the payment of any loss, or who prepares, makes or subscribes any account, certificate of survey, affidavit or proof of loss, or other book,

paper, or writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim, is punishable by imprisonment in the state prison not exceeding three years, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment."

In a case passed on by the Supreme Court of the United States, it appeared that the insured appeared for examination under oath, and made certain statements relative to the acquisition of the property involved. It is stated that there was evidence tending to show that his answers were made not with the purpose of deceiving and defrauding the insurance companies, but in order that he might be consistent with a statement theretofore made to R. G. Dun & Co.

" * * * And every interrogatory that was relevant and pertinent in such an examination was material, in the sense that a true answer to it was of the substance of the obligation of the assured. A false answer as to any matter of fact, material to the inquiry, knowingly and wilfully made, with intent to deceive the insurer, would be fraudulent. If it accomplished its result, it would be a fraud effected; if it failed, it would be a fraud attempted. And if the matter were material and the statement false, to the knowledge of the party making it, and wilfully made, the intention to deceive the insurer would be necessarily implied, for the law presumes every man to intend the natural consequences of his acts. No one can be permitted to say, in respect to his own statements upon a material matter, that he did not expect to be believed; and if they are knowingly false and wilfully made, the fact that they are material is proof of an attempted fraud, because their ma-

teriality, in the eye of the law, consists in their tendency to influence the conduct of the party who has an interest in them, and to whom they are addressed. 'Fraud,' said Mr. Justice Catron, in Lord v. Goddard, 13 How., 198, 'means an intention to deceive.' 'Where one,' said Shepley, Ch. J., in Hammatt v. Emerson, 27 Me. 308-326, 'has made a false representation, knowing it to be false, the law infers that he did so with an intention to deceive.' 'If a person tells a falsehood, the natural and obvious consequence of which, if acted on, is injury to another, that is fraud in law.' Bosanquet, J., in Foster v. Charles, 7 Bing., 105; Polhill v. Walter, 3 B. & Ad., 114; Sleeper v. Ins. Co., 56 N. H., 401; Leach v. Ins. Co., 58 N. H., 245.

* * * * * * *

The fact whether Murphy had an insurable interest in the merchandise covered by the policy was directly in issue between the parties. By the terms of the contract, he was bound to answer truly every question put to him that was relevant to that inquiry. His answer to every question pertinent to that point was material, and made so by the contract, and because it was material as evidence; so that every false statement on that subject, knowingly made, was intended to deceive and was fraudulent.

And it does not detract from this conclusion to suppose that the purpose of Murphy in making these false statements was not to deceive and defraud the Companies, as is stated in the bill of exceptions and certificate, but for the purpose of preventing an exposure of the false statement previously made to the commercial agency in order to enhance his credit. The meaning of that we

take to be simply this: that his motive for repeating the false statements to the Insurance Companies was to protect his own reputation for veracity, and that he would not have made them but for that cause. But what is that, but that he was induced to make statements, known to be false, intended to deceive the Insurance Companies, lest they might discover, and others through them, the falsity of his previous statements; in other words, that he attempted, by means of a fraud upon the Companies, to protect his reputation and credit? In any view, there was a fraud attempted upon the insurers; and it is not lessened because the motive that induced it was something in addition to the possible injury to them that it might work. The supposition proceeds upon the very ground of the false statement of a material matter, knowingly and wilfully made, with the intent to deceive the defendants in error; and it is no palliation of the fraud that Murphy did not mean thereby to prejudice them, but merely to promote his own personal interest in a matter not involved in the contract with them. By that contract, the Companies were entitled to know from him all the circumstances of his purchase of the property insured, including the amount of the price paid and in what manner payment was made; and false statements, wilfully made under oath, intended to conceal the truth on these points, constituted an attempted fraud by false swearing which was a breach of the conditions of the policy, and constituted a bar to the recovery of the insurance."

Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 95, 97 (28 L. Ed. 82).

In a case where the insured claimed a total loss to insurance of $30,000, claiming a valuation of the property destroyed of approximately $36,000, and the jury returned a verdict of $17,000, the Appellate Court reversed the judgment of the lower court, holding that this disparity of nearly $19,000 shows on its face that, as a matter of law, the proof of loss was fraudulent. It also holds that where claim was made for approximately $2500 on goods in process, and the evidence shows that as a matter of fact that sum was the contract price the company was to receive for manufacturing goods for others, that there could be no other conclusion than that the statement in the proof of loss was knowingly made for the purpose of getting money from the insurance company that plaintiff was not entitled to, and was fraudulent as a matter of law. In that case the proof of loss was signed and sworn to by the President of the plaintiff corporation.

United Firemen's Ins. Co. v. Jose Rivera Soler & Co., 81 F. (2d) 385.

In another case it was held that where the amount of loss was overstated by some $16,000 or, to express it another way, it was claimed that approximately 5,000 pairs of shoes in excess of what the books of the insured showed could have been in the store, the trial court properly granted a directed verdict. The Appellate Court said:

"The claim made in the proof of loss *and in the evidence at the trial* is not only false, but so grossly excessive as to value that no other con-

clusion could be drawn than that it was knowingly and fraudulently made." (Italics ours.)

Cuetara Hermanos v. Royal Exchange Assur. Co., 23 Fed. 270, 272. (Certiorari denied. 277 U. S. 590 (72 L. Ed. 1002).)

In another case where the evidence showed the goods were soaked with kerosene but only a very small portion of the goods were completely destroyed, that the insured swore to a value in excess of $43,000 and a loss in excess of $35,000, that an expert appraiser of the Underwriters' Salvage Company estimated the sound value at a little over $22,600, and the total damage at a little less than $12,700, and that the appraiser fixed the sound value of the goods at a little over $26,000 and the damage at a little less than $14,000, the court held:

> "The oath as to values in the proofs of loss was not a mere matter of opinion. It was a sworn estimate of value by one having special knowledge of the property made, with the intent that the other party, ignorant on the subject, and with unequal means of information, should rely upon it to his injury. It appeared that this estimate of value was grossly excessive, and *the circumstances surrounding the fire were such as to warrant the conclusion that it was willfully false and fraudulent.*" (Italics ours.)

The court also holds that denial of liability does not waive the breach of conditions relative to false swearing.

Orenstein v. Star Ins. Co., 10 F. (2d) 754.

Where the insured filed proofs of loss claiming that the value of the property destroyed exceeded $12,000, although he had bought it with other property, for $10,000, and none of his witnesses testified to a value exceeding $8,000, the court held that the question of false swearing should have been submitted to the jury.

> "The policy is avoided not only for fraud, but also for false swearing by the insured touching any matter relating to the insurance or the subject thereof, 'whether before or after a loss'. If the condition were against fraud alone, the argument as to reliance by the company might be pertinent; but the condition against false swearing is broken when a false oath is knowingly and willfully made by the insured as to any matter material to the insurance or the subject thereof. It is said in some of the cases that same must be made with intent to deceive or defraud * * * But, as pointed out by the Supreme Court of the United States in Claflin v. Ins. Co., 110 U. S. 81, 95, 97, 3 S. Ct. 507, 515, 28 L. Ed. 76, the intent to deceive and defraud is necessarily implied in the intentional and willful making of a false statement as to a material matter."
>
> *Globe & Rutgers Fire Ins. Co. v. Stallard,* 68 F. (2d) 237, 240.

The court also holds that it is no defense to false swearing that further proofs of loss have been waived by the conduct of the adjuster.

In a case where the Chief of the Fire Department testified that there were four separate fires on three separate floors, and cloth saturated with kerosene was found in different parts of the building, the proof of

loss claimed a value of $24,000 and a damage of $22,-000, the jury returning a verdict of $5,000, the court held that the finding of the jury was against the weight of the evidence and reversed the judgment.

Domalgalski v. Springfield, 218 N. Y. S. 164.

Here it appears that two months preceding the fire, insurance on the stock was increased from $30,000 to $180,000, that coverage on fixtures was also increased and that only a month before the fire the corporation took out insurance against loss of profits, that the insured claimed to have had stock on hand in an amount much greater than the merchandise inventory showed, and bills were introduced to show that insured had purchased a large quantity of merchandise and it further appeared that many of these bills were altered and the amounts thereof changed, the court says:

> "Where the evidence is clear and convincing as to the perpetration of the fraud, and there is really no countervailing proof, the court is not to stultify itself by holding that there was any real issue in this case, which requires submission to another jury. Any verdict in favor of plaintiff, in view of the evidence presented in this record, would rightfully be set aside by the Trial Court."

Demarest v. Westchester Fire Ins. Co., 255 N. Y. S. 325, 329.

In a case in Wisconsin the defendant insurance company admitted the policy and the fire but denied that the value of the property was as alleged in the proofs of loss. Evidence was introduced to show that plaintiff made fraudulent entries in his books of account setting up as its original inventory a great

amount of merchandise which did not in fact exist. The policy contained a provision to the effect that any fraud or false swearing by the assured should render the policy void. The fire was a "flash fire" and had the appearance of having been fed by some inflammable liquid. The jury returned a special verdict holding that the plaintiff did not knowingly and falsely represent the amount of the loss to be substantially in excess of the true amount. On appeal the judgment for plaintiff was reversed with directions to change the answer to the special verdict and enter judgment in favor of the defendant, dismissing the action. The court states there was evidence which would warrant a jury in determining the fire was of incendiary origin and which tended to show respondent's profits were not as represented and the claim of damages was excessive. The court held that applying the percentage of profits shown in the income tax return, or during the last few months of the business, would reduce to a marked degree the amount of goods on hand. It also stated that a fire burning evenly and the result of a flash, never developing sufficient heat to destroy any part of the structure in which the fire occurred, and leaving a large amount of goods easily identifiable could not in the nature of things consume a large amount of merchandise in the same room with paper labels, and other like material, without some evidence of the burning. The conclusion, therefore, must be that the goods were not in the building at the time of the fire, and that the respondent knew this and that its proofs of loss were made out with the intention of inducing the insurer to act to its disadvantage. It

held that if the insured knowingly and willfully, and with intent to defraud the insurer, swore falsely in making proof of loss, such act amounted to a fraud upon the insurer.

Liberty Tea Co. v. LaSalle Ins. Co., 238 N. W. 399.

It is also held that false swearing by an agent authorized to make proofs of loss will defeat the rights of the insured under the policy, even though the insured be innocent.

American Eagle Fire v. Vaughan, 35 F. (2d) 147.

In another case the insured's proof of loss set forth a claim showing damages of $73,000. The jury found the loss to be $33,000, and also found that the insured did not falsely state the amount of the loss with intent to defraud the insurer. The court held that these findings were not capable of being reconciled and reversed the judgment. It stated:

> "Under the Wisconsin Standard fire insurance policy, the insured, if he suffers a loss, must honestly state, under oath, the extent of his loss, and give this information to the insurer. He must not make false proofs of loss with intent to defraud the insurer. Although the penalty is heavy and seemingly harsh, it is one way of stopping the presentation of false, fictitious or inflated claims. False and exaggerated claims seemingly go hand in hand with incendiarism. The court should therefore unhesitatingly act to prevent attempted frauds on the part of the insured."

American Home Fire Assur. Co. v. Juneau Store Co., 78 F. (2d) 1001.

AS TO ALLEGED ERRORS PREDICATED UPON THE ADMISSION OF EVIDENCE.

The major portion of the errors assigned in the bill of exceptions consist of the admission of evidence over objection by the appellant. The rule has been well expressed by this court in an opinion by Judge Sawtelle.

> " 'since the rulings of the lower court upon the admissibility of evidence in an equity suit are in no way binding upon us and if wrong do not constitute reversible error * * * it is unnecessary to discuss the assignments of error based upon them.' Johnson v. Umsted (C. C. A. 8) 64 F. (2d) 316, 318; Unkle v. Wills (C. C. A. 8) 281 F. 29, 34."

Strangio v. Consolidated Indemnity & Ins. Co., 66 F. (2d) 330, 336.

To the same effect see

Johnson v. Umsted, 64 F. (2d) 316.

AS TO ERRORS RELIED UPON BY APPELLANT.

AS TO THE FIRST ERROR RELIED UPON.

The first error relied upon is that

> "The trial court erred in denying plaintiff's motion for special findings."

Yet appellant admits that the court did make findings, for in subdivision (d) of its first ground of error, it is stated that

> "Many of the findings made by the trial court were not within or not responsive to the issues, or

were upon merely evidentiary matters." (Appellant's Brief, p. 16.)

"Subdivision (c) under the first specification of error is that the court failed to find upon the principal issue of this case. The principal issue in this case arose upon the answer of defendants upon false swearing." (Appellant's Brief, p. 14.)

Yet the court found

"That plaintiff was guilty of fraud and false swearing in connection with his proofs of loss, and the pleadings and testimony in this case, and that his conduct has barred his right of recovery herein * * * The evidence on the phases which I have discussed, being clear and convincing bars plaintiff's right to recover and makes it unnecessary to discuss or find upon the other issues. In view of the discussion of the facts and the law in this opinion, I adopt it as my findings of fact and conclusions of law, and the motions of the respective parties for special findings is denied and exceptions noted." (Vol. I, p. 203.)

The court also holds:

"The evidence in this case shows that the overvaluation resulted from no such inadvertence, but from an intentionally fraudulent attempt to get an excessive award from the insurance companies." (Vol. I, p. 180.)

As we have already pointed out, the court, in denying petition for rehearing, further held:

"In order to avoid any possible misunderstanding, I find that plaintiff was guilty of willful and intentional fraud and false swearing in making his proofs of loss." (Vol. I, p. 233.)

The court thus adopted its written opinion as its finding of fact and conclusions of law. This is a recognized practice. The defenses to the action were fraud and false swearing in connection with the sworn proofs of loss, and also in connection with the complaints filed in the Superior and Federal Courts. There were also denials of the amount of loss claimed by appellant. It clearly appears that the court has found definitely on these defenses. It has found that there was wilful and deliberate fraud and false swearing violating the contracts entered into between appellant and appellees. As the result of such findings, the court, as a conclusion of law, has decided that appellant was not entitled to recover and that defendants were entitled to a decree with costs.

In addition the court has found that the fire was incendiary, and that this was known to appellant. It is also found that there was an over-statement of the amount of loss, which was wilfull and intentional. It is also found "that there was little or no merchandise burned out of sight". (Vol. I, p. 187.) In this connection the court has found that it was not necessary to ascertain the amount of the property, if any, which was burned out of sight as its decision as to fraud and false swearing was determinative of the issue.

In connection with the question of fraud and false swearing the court has also found relative to fraud and false swearing in the testimony at the trial. Naturally, appellees could not anticipate the evidence which would be introduced by appellant and could not set up anticipatory defenses. However, under the

authorities cited under the heading "Fraud and False Swearing" in this brief, we have pointed out that this provision of the policy is also applicable to testimony given at the trial. The court has found specifically relative to this fraud and false swearing, and has enumerated the various instances in which it has occurred, among others relative to the pricing of the inventories introduced by appellant, relative to testimony as to the contents of the building, relative to increasing grading of the goods and relative to changes in records and preparation of fictitious contracts. It is true that in making these findings, the court has stated portions of the evidence introduced which led him to form his conclusions. The careful and able opinion of the trial judge is certainly of very much greater assistance to this court in arriving at a correct determination than would have been set, stereotyped findings to the effect that the allegations of the complaint were untrue, and the allegations of the answer were true, resulting in a conclusion of law that appellees were entitled to a decree. This opinion shows careful study and a thorough understanding of the case. As a matter of fact, it is, in our opinion, remarkable that any trial court sitting through such a lengthy trial could have waded through the mass of testimony and exhibits to arrive at such a clear, concise statement of the most vital issues which had been proved. The trial judge not only had the opportunity to examine the exhibits during the testimony, but he also listened to and observed the various witnesses who were produced by both sides. He is frank in stating that he believed some witnesses and did not believe others.

The trial court had the opportunity of observing the manner of testifying and the apparent evasiveness of many of the witnesses. His observations, of course, cannot be duplicated by this court by either reading that testimony as reduced to cold print, or by reading the briefs of the attorneys for the parties. We believe that the findings of the trial court as set forth in the opinion constitute a compliance with Equity Rule 70½. However, if this Honorable Court finds that the findings, as set forth in that opinion, do not comply with this rule, or that they are inadequate and should be amplified, the rule is very well stated as follows:

> "* * * On an equity appeal where no findings of fact or insufficient findings are made in the court of first instance, the appellate tribunal has power either to send the case back for further disposition or to make findings itself and decree accordingly. Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 179, 20 S. Ct. 336, 44 L. Ed. 417. Inasmuch as both parties had full opportunity to present all their material evidence on this issue and did present proofs sufficient for a finding, we choose to resolve the issue here."
>
> *Horwitz v. N. Y. Life,* 80 F. (2d) 295, 302.

> "An appeal in an equity suit invokes a new hearing and decision of the case upon its merits upon the lawful evidence. * * * The reviewing court will, if possible, dispose finally of an equity suit upon the record on appeal and not remand it for further trial in the District Court."
>
> *Johnson v. Umstead,* 64 F. (2d) 316, 318.

This court has had occasion to consider Equity Rule 70½ in a case cited by the trial judge, and upon

which he relied. That opinion was written by Judge Wilbur.

> "The rule is well settled, in states where findings are required by law, that it is not necessary to make findings on all defenses wherein findings actually made require a judgment in favor of either party. We do not believe that the Supreme Court intended to extend this rule by Equity Rule No. 70½ so that in every case there must be specific findings upon every issue, regardless of the fact that findings actually made sustain a decree, nor do we believe that it was the intention of the Supreme Court to introduce into equity and admiralty practice the difficulties inherent in the preparation of precise findings upon every material issue involved in the litigation. The rule is evidently intended to advise the courts on appeal of the decision of the trial court as to the material issues. It is obvious that, where the judgment of the trial judge, in determining the controverted issue of fact, is given great weight upon the appeal, in case of conflicting evidence by witnesses who testify in the presence of the judge, the appellate court in exercising its jurisdiction in equity and admiralty cases should be advised of the conclusion of the trial court as to where the truth lies as between witnesses who contradict each other. It may be conceded that in this case and all infringement cases it is a decided advantage to have the views of the trial judge upon the entire question, and particularly in cases of noninfringement the ground upon which the trial court finds noninfringement. The rule does not require this to be done. * * * In these cases the district judge filed an opinion and adopted the

same as his findings of fact and conclusions of law. We see no objection to this course. Until the opinion is adopted by the court as its findings of fact and conclusions of law, it is not a part of the record."

Parker v. St. Sure, 53 F. (2d) 706, 708-709.

This court also passed on the same question in a later case in which appellant also contended that the trial court had made numerous errors in its memorandum opinion. The court states:

"While Equity Rule 70½ requires that 'the court of first instance shall find the facts specially and state separately its conclusions of law thereon', and a literal compliance therewith would be attended with undoubted advantages to an appellate court and facilitate the presentation and consideration of appeals, we think the mere fact that the findings and conclusions—if sufficiently specific and otherwise in compliance with the rule—are set forth in the court's written opinion and adopted by the court as such findings and conclusions, is not such a violation of the rule as calls for a reversal of the decree."

National Reserve Ins. Co. v. Scudder, 71 F. (2d) 884, 888.

In addition, the rule is well settled that in equity actions the judge's findings, supported by substantial evidence, cannot be disturbed on appeal. This court has so held:

"It would serve no useful purpose to set forth the conflicting testimony relating to payment of the mortgage, because after an examination of

the record, we feel bound by the well settled rule that the findings of the chancellor, based on conflicting evidence, are presumptively correct and will not be set aside unless a serious mistake of fact appears."

National Reserve Ins. Co. v. Scudder, p. 887, supra;

McCullough v. Penn Mutual Life Ins. Co., 62 F. (2d) 831.

"As was said by Judge Rudkin, in the case of Easton v. Grant (C. C. A.), 19 F. (2d) 857, 859, 'the appellant is confronted by two well-established principles of law, from which there is little or no dissent: First, the findings of the chancellor, based on testimony taken in open court, are presumptively correct and will not be disturbed on appeal, save for obvious error of law or serious mistake of fact.' The second principle above referred to has no application here. See, also, Jones v. Jones (C. C. A. 9), 35 F. (2d) 943, and United States v. McGowan (C. C. A. 9), 62 F. (2d) 955, 957."

Collins v. Finley, 65 F. (2d) 625, 626.

"It is true that in an equity case the evidence is reviewed by this court, but it is a fundamental rule that, where the witnesses testify in person before the trial judge he is in a better position to pass upon the credibility of a witness than this court, and we will follow the decision of the trial judge unless it is clearly apparent that his decision is erroneous. Savage v. Shields (C. C. A.), 293 F. 863; Easton v. Brant (C. C. A.), 19 F. (2d) 857; Jones v. Jones (C. C. A.), 35 F. (2d) 943. The court rejected the testimony of

a large number of witnesses adduced by the government as not worthy of full credit."

United States v. McGowan, 62 F. (2d) 955, 957 (C. C. A. 9).

In view of the fact that both parties were allowed opportunity to present evidence at length on all issues, and in view of the fact that the trial judge has passed away subsequent to the decision of this case, we believe that if this court finds that the findings should be differently expressed, it will exercise its prerogative of making those findings rather than send this case back for another lengthy trial which could result in no other decision.

Under the views expressed by the court, any additional findings he might have made would necessarily have been adverse to appellant.

Appellant's complaint that the court has failed to find the amount of appellant's loss, is due, as we have heretofore pointed out, to the fact that appellant has offered no proof as to the amount of loss sustained with the exception of admittedly erroneous reports of accountants purporting to show an apparent inventory. The court has found against those reports, stating:

> "I find that the value of the stock at the time of the fire was approximately $88,000." (Vol. I, p. 178.)

The court also states that the testimony shows that at least 75% of the salvaged stock could be made into new bags (Vol. I, p. 185), and that the testimony of

disinterested witnesses shows that the damage was not in excess of 25%. The court has also stated that there was very little stock burned out of sight, and that if it were necessary for him to determine this amount of out of sight loss he would find it to be the difference between the perpetual inventory, namely, the approximate $88,000 of value which he finds, and the Radford inventory, or approximately $2000. The loss as found by the court, therefore, is susceptible of simple arithmetical calculation. If we take the maximum of $2000 as burned out of sight from the $88,000 of value found by the court, we find a remaining $86,000 which the court finds was damaged not to exceed 25%, or $21,500. This would, therefore, leave a maximum loss of $23,500 as against an original claim of $73,000 and a subsequent claim of $106,000.

The court has not reduced this arithmetical calculation, but it has found that the amount of damage is "so far below even the lowest claim of loss that unless large quantities were burned out of sight, plaintiff's claims are so excessive as to be false and fraudulent." (Vol. I, p. 182.)

The court has also found that the claim as to out of sight loss, amounting in one instance to $15,000, and the other to $46,000, cannot be supported, and has stated, as we have pointed out, that if it were necessary for him to determine this amount he would fix it at $2000.

We believe that the points raised under this first assignment of error have been amply covered in our

statement as to facts, the nature of the case, and the evidence produced.

Counsel refers to some of the cases cited by us relative to the question of Equity Rule 70½. He also calls attention to the dissenting opinion of Justice Butler in *Los Angeles Gas & Electric Co. v. Railroad Commissioner,* 289 U. S. 287. It will be noted, of course, that this is not the opinion of the Supreme Court but merely a statement in a dissenting opinion.

As to the case of *Panama Mail Steamship Company v. Vargas,* 281 U. S. 670, which went up from this court, we desire to call the court's attention to the fact that

> "The district court delivered no opinion and made no findings of fact other than such as may be implied from the decree. * * * The decree does not show on what premise of fact or law it was given, but only that it was given on some premise which in the court's opinion entitled the plaintiff to the decree."

Counsel also refers to various sections of Cal. Juris. and authorities to the effect that a defense which is not pleaded cannot be considered. We have no disagreement with these authorities. For instance, in one it is stated:

> "The complaint avers due proof of loss and a compliance with the conditions of the policy in other respects. The answer denies this allegation, sets out the proof of loss made, and points out several alleged defects in it *but does not charge that it is either false or fraudulent.* * * *" (Italics ours.)

It is also stated that there were objections to the proof. The court says:

> "It does not charge that it was wilfully false or untrue, states no facts constituting fraud, and does not claim a forfeiture has been incurred. As there was another apparent reason for giving the notice and for pleading it, I think the answer did not inform the plaintiff that fraud was charged or that a forfeiture would be claimed."
>
> *Greiss v. State Investment etc. Co.*, 98 Cal. 241, 243-244.

The answers in this case charge specifically that plaintiff violated the terms and conditions of the policy relative to fraud and false swearing in respect to statements made in his proof of loss and in the various complaints, and that at the time of making these statements he knew that the same were false and untrue, and that they were made for the purpose of inducing appellees to pay a loss in excess of that sustained.

AS TO THE SECOND ERROR RELIED UPON.

This error is in two parts, first, that the trial court erred in finding "that plaintiff was guilty of fraud and false swearing in his proofs of loss, and that there was over-valuation which resulted from an intentionally fraudulent attempt to get an excessive award from defendant insurance companies"; and, second, that "any defense of false swearing was waived".

The ground of this second error is quite remarkable in view of the fact that the first ground of error assigned is that the court made no finding. We now find appellant complaining because he contends that the court did find he was guilty of fraud and false swearing.

It is claimed that there is no basis for finding fraud in this case. The court has found that "the values in the original proof of loss were padded; they were padded in several pleadings filed in this case and in the attempted proof at the trial", and "that the over-valuation resulted from no such inadvertence but from an intentionally fraudulent attempt to get an excessive award from the insurance companies". The court, in his opinion, points out the evidence upon which he bases such a finding. We have already discussed this evidence earlier in the brief. Even assuming that there is evidence to the contrary, the finding of the trial court based on evidence, even though conflicting, must be sustained. We have already pointed out the law in this respect in our citations under the first assignment of error.

Appellant also contends that "the appellees have never parted with one dollar to appellant herein. They have always resisted appellant's claim, hence it is a necessary conclusion that they have never relied upon and never been injured by any statements or representations of plaintiff * * *". (Appellant's Brief, p. 20.) They then cite certain authorities with which we have no contention. In other words, that fraud without injury is not a defense, or

does not give rise to a cause of action. Appellant overlooks the fact, however, that the defenses relied upon here in this action, and the fraud and false swearing relied upon, are a portion of the contract entered into between the parties. We have already pointed out to the court the law relative to fraud and false swearing.

As stated in the authorities cited by us, the intent to deceive and defraud is necessarily implied in the intentional and wilful making of a false statement as to a material matter, and it is no palliation of the fraud that the insured did not mean thereby to prejudice the insurance companies. The law presumes every man to intend the natural consequences of his act and he cannot be heard to say that he did not expect to be believed. The mere fact that appellant was unsuccessful in his attempt to defraud does not justify the attempt or relieve him from the forfeiture imposed by the contract into which he entered. Again, if this court feels that the finding is too general, it is a simple matter for it to exercise its prerogatives and make a finding which will cover the situation. We do not consider it necessary to discuss the California authorities, as we have already pointed out the Federal authorities covering this situation, and the finding of the court that the fraud was wilful and intentional answers all the points raised in the authorities cited by counsel. We have also discussed at length all of the evidence referred to by counsel.

However, in regard to the contention that plaintiff did not know the facts and relied upon others, we

have not only the finding of the court upon this subject, but we also desire to again call this court's attention to the fact that appellant testified that he knew the figures in the reports of the auditors to be correct (Vol. I, p. 441); that he always paid attention to Calcutta prices and received cables and telegrams relative to prices sometimes every day, very often oftener than once a week (Vol. I, p. 527); that he was familiar with values on October 19th and on the day when he was testifying (Vol. I, p. 526); that he did all of the purchasing and selling for his company; that he informed adjuster Smith that the grades and prices were 100% right (Vol. V, p. 2754); that he was informed that if he swore to these prices he would vitiate his policy. (Vol. V, p. 2755.) Despite the contentions of appellant, the court has found, and properly so, that appellant did not rely upon his bookkeeper and accountants, but that he "knew what was in his factory and that his claim of loss was over-valued". (Vol. I, p. 181.)

Appellant also sets up some nine grounds showing the general basis of his claim. However, we have already discussed each of these points earlier in this brief, and the best that can be said in appellant's favor is that there is a conflict of testimony which has been resolved against him by the trial court.

Appellant also attempts to show that there was a waiver of any defense of false swearing. In making this contention appellant evidently overlooks the well settled rule of law that in order to rely upon waiver the *same must be alleged and proved.* There is no

allegation, nor has there ever been a claim until this appeal, that there was any waiver of the defense of false swearing.

Kohner v. National Surety Co., 105 Cal. App. 430;

Goorberg v. Western Assurance Co., 150 Cal. 510, 519;

Aronsen v. Frankfort Ins. Co., 9 Cal. App. 473;

Arnold v. American Insurance Co., 148 Cal. 660-668;

Bank of Anderson v. Home Ins. Co., 14 Cal. App. 208, 214.

It is interesting to note that in the brief it is stated:

> "* * * appellees for many months treated the policies as in full force and effect, and by their conduct waived any defense of fraud or false swearing, and the court should have so found." (Appellant's Brief, p. 19.)
>
> "Their conduct at all times was that the contract was in full force and effect and that they were liable thereon." (Appellant's Brief, p. 35.)

But, as strangely inconsistent as appellant is in many instances in the brief, we find under the same assignment of error the following statement:

> "The appellees have never parted with one dollar to appellant herein. *They have always resisted appellant's claim, * * *"* (Appellant's Brief, p. 20.) (Italics ours.)

Which statement are we going to accept? That the appellee always treated the contract as in full force and effect, and that they were liable thereon, or that they always resisted the claim?

AS TO THE THIRD ERROR RELIED UPON.

The claim of appellant is that the court erred in holding "that the heart of plaintiff's contention is that large quantities of goods were burned out of sight, and that unless large quantities were burned out of sight, plaintiff's claims are so excessive as to be false and fraudulent."

Counsel for appellant take the position that the use of the word "heart" must mean that this claim was the largest and most important element of the loss, and that such a statement was erroneous as the claim of loss on salvaged merchandise was nearly 80% of the amount claimed in the proof of loss. Incidentally, in this respect it is very interesting to note that appellant objected to the introduction of the proof of loss in evidence, and specifies as their fourteenth assignment of error that the court erred "in overruling plaintiff's objections to the admission in evidence of plaintiff's proof of loss, Defendant's Exhibit A, plaintiff not relying upon said proof of loss and claiming a greater loss than therein stated. Said exhibit details plaintiff's loss of merchandise in total sum of $73,601.96." (Vol. VI, pp. 3390-3391.)

This is particularly interesting as it will be noted that throughout the entire brief, with the exception of

two places, counsel dwells on the figure of plaintiff's claim of loss being $73,601.96, including a claim for merchandise burned out of sight of $15,645.25. This latter figure appears on pages 34, 38 and 52 of the brief. Apparently counsel for appellant are not very happy about the increased claim, which increase is due to claiming that approximately $46,000 worth of merchandise was burned out of sight. Counsel have studiously avoided this figure, and we do not find it mentioned in a single instance in the brief. Their whole argument is based on the original claim and $15,000 out of sight.

We know of no definition of the word "heart" showing it to mean largest or most important. It is often used synonymously with life, but is generally applied to that vital part which when stopped robs the body of life. In that respect, the statement of the court that the heart of plaintiff's contention is that large quantities of goods were burned out of sight is literally true. When we stopped that contention plaintiff's claim and hopes of recovery died.

We have heretofore shown that there is no evidence, outside of deductions from a report purporting to show the apparent inventory, to establish any loss out of sight. We have already treated that subject in detail, showing the inability of plaintiff to make any showing except that *he saw some ashes,* the inability of Mr. Taylor to identify any portion of the $46,000 of out of sight, the inability of Mr. Sugarman to specify any out of sight, and the fact that the report of the accountant indicating a loss out of sight was

entirely due to duplication of purchases. Before proofs of loss were filed, plaintiff and his adjuster were challenged to show anything that was burned out of sight. We repeated these challenges during the trial, and to date there has not been one iota of evidence to show what, if anything, was burned out of sight or totally destroyed. We have also treated the question of debris, showing that as a matter of fact there was no debris representing merchandise, and showing what the result would have been if we accepted the testimony relative to the removal of debris. The trial court was absolutely correct in stating in its opinion:

> "Unless large quantities were burned out of sight, plaintiff's claims are so excessive as to be false and fraudulent."

Although counsel for appellant would gladly overlook the figure of approximately $46,000 representing this out of sight merchandise, the evidence produced by appellant on the trial was all directed to sustaining this figure and not the $15,645.25. However, we believe that we have sufficiently pointed out the facts relative to this claim to convince this court that an attempt to recover even this item of $15,645.25 as a claim for merchandise out of sight, was false and fraudulent, and that the action of appellant in attempting to recover either this amount or the amount of approximately $46,000 could only justify a judgment in favor of these appellees.

Counsel cites, on page 44 of his brief, certain authorities to the effect that a mere overvaluation made

in good faith will not defeat a recovery. There is no question that such is the law. However, the merchandise involved in this claim was not of a character which would justify an overvaluation made in good faith. It was merchandise as to which appellant testified he knew the market value. He knew the type of merchandise which he, and he alone, was purchasing, and yet he subscribed and swore to a proof of loss showing merchandise of higher grades and prices than any which he had purchased. He deliberately increased prices by raising the grade of the merchandise, and he also made a claim, *not as he has stated at landed cost, but at retail selling price, plus ½¢ a yard.* This certainly is not a question of honest overvaluation, or the act of an honest man.

AS TO THE FOURTH ERROR RELIED UPON.

The basis of this claim of error is that "the court erred in finding that plaintiff knew what was in his factory and that his claim of loss was overvalued, and that he tried to escape responsibility for any overvaluation on the ground that the proofs were prepared by his employees, and in finding that their knowledge would be imputed to him."

If we were to admit all of the arguments advanced by counsel for appellant under this title, we would still find that appellant was guilty of false swearing during the course of the trial sufficient to void his claim. In this respect we refer to Exhibit 165, made up and prepared by plaintiff himself, and to his testi-

mony relative to that exhibit. This exhibit was produced and testimony relative thereto given by appellant on rebuttal. We have treated it at length under the heading "As to other false swearing by appellant during the course of the trial."

Under our discussion "As to pricing of Radford inventory and proof of loss", we have devoted considerable time to showing plaintiff's knowledge of the claim, his testimony relative to Defendant's Exhibit B, the fact that despite his knowledge of costs and the fact that he personally handled all sales and all large purchases, despite the fact that Sugarman agreed with Mr. Smith that the proof would be priced on replacement value in San Francisco, and despite the fact that appellant was warned that by using the method and prices adopted by him he was vitiating his policy, Hyland stated that "we will take all the chances on that". He proceeded to sign, swear to and present to the insurance companies a proof of loss, for the purpose of collecting a loss which he knew he had not sustained. He knew that that proof of loss, and the complaint subsequently verified by him, were grossly excessive and wilfully overstated. He had been warned that his actions constituted a breach of his contract, and that he would avoid that contract. He preferred to take his chances, and now that the court has found against him on the grounds of fraud and false swearing, he is attempting to hide behind an adjuster and his accountants and his bookkeeper, because he himself did not do the manual work of preparing the instruments which he subscribed and verified. Surely

the court could have made no other finding, and just as surely this court is not going to permit this appellant to resort to such a subterfuge. The parties who did the actual mechanical labor were employed by appellant and by him authorized to prepare these various statements. The result of their work was ratified and verified by appellant. He not only should have known, but did know, the falsity of these claims. To sustain appellant's contention would mean that it would be impossible to enforce the breach of a condition of a contract in the case of a corporation which must act through human instrumentality, or against an individual who has the means, or is smart enough to employ someone else to prepare false statements for his signature.

AS TO THE FIFTH ERROR RELIED UPON.

Appellant claims "the court erred in considering the suspicious circumstances surrounding the fire in connection with the alleged fraud and false swearing."

Counsel would infer that there were no suspicious circumstances in connection with this fire, as is evidenced by the statement in the brief:

> "If there were any suspicious circumstances surrounding the fire * * *". (Appellant's Brief, p. 61.)

These circumstances have been heretofore treated by us and are set forth at length in the opinion of the court. There is not one word of testimony to the effect that appellant knew nothing about these circum-

stances. On the contrary, we have the absolutely uncontradicted evidence of the Fire Marshal and his assistant that they were called to appellant's attention. We also have the testimony that he named three parties whom he considered responsible.

Counsel also states that there is no issue relative to the type of fire. The court will remember that one of our defenses was based on the ground of fraud and false swearing wherein we charged that appellant knew that the fire was of incendiary origin and swore that he had no knowledge or belief as to its origin. In addition to that, the fact that there were a number of separate fires in this building, that there was a great deal of merchandise saturated with kerosene, that there were pans and drums of kerosene scattered throughout the building, and that the fire was a "flash fire", are certainly indicative of a general scheme to defraud the insurance companies and support defenses of fraud and false swearing.

AS TO THE SIXTH ERROR RELIED UPON.

Appellant contends that "the court erred in considering that the amount of insurance carried on the stock was a suspicious circumstance."

We have already discussed in our brief the question of the amount of insurance. We have pointed out that much of this was new insurance, and that previous to a short time before the fire plaintiff had not carried use and occupancy insurance. We have also shown that in the event of a total destruction of the

plant, accepting values as shown by us, appellant would have profited to the extent of $250,000. Surely such evidence is admissible as part of the general scheme to defraud the insurance companies. There would have been no advantage to appellant in putting in a false and exaggerated claim if there had been no insurance for him to collect, or if the insurance had been insufficient to pay such a claim. On the other hand, if a party were charged with burning insured property, surely evidence that the insurance was less than the value of the property, and that instead of profiting by the destruction of the property, the insured would have sustained a loss, would be admissible. It follows also that where an insured stands to make a profit such as that which would have accrued to this appellant in the event of total destruction of the property, the fact that the insurance was of a new type, had been recently placed, and was grossly excessive, was certainly a circumstance when taken in connection with the proof of fraud and false swearing.

AS TO THE SEVENTH ERROR RELIED UPON.

Appellant claims that "the court erred in holding that the failure to settle the loss by arbitration was due to the conduct of plaintiff and his appraiser."

This appellee has no interest in this assignment as it almost immediately denied liability and never demanded an appraisement. We shall not therefore discuss the evidence referred to in the argument under this assignment. However, in connection with this

assignment of error, appellant brings up the question of the auction sale. It is stated:

> "The appellees consented to this auction sale". (Appellant's Brief, p. 77.)

We have already discussed this auction sale and shall not discuss it further except to question this and numerous other misstatements in this brief which we prefer to consider as unintentional and due to the fact that the writer of this brief has only been active in this case for the past five months. The only evidence of any kind relative to consent to an auction sale is that relative to the conduct of R. V. Smith, and this evidence was introduced only as to certain appellees, and on the objection of others, including this appellee, was not admitted as against them. R. V. Smith was not in any way connected with, or employed by, this appellee.

We have heretofore pointed out the misstatements on pages 19 and 35 that appellees for many months treated their policies as being in full force and effect, and were liable thereunder and participated in the sale of the merchandise at the auction. There is also a misstatement along the same line on page 48, namely, that "the pricing was done in accordance with an agreement or supposed agreement between Mr. Sugarman representing plaintiff and Mr. Smith representing appellees."

Again appellant states, referring to the method of pricing:

> "Certainly the adoption of this procedure pursuant to an understanding, or even a belief of an

> understanding, with the *agents* of appellees cannot, by any stretch of the imagination, be deemed fraudulent." (Italics ours.) (Appellant's Brief, p. 57.)

It is also stated that

> "The sale of the salvaged merchandise and its dispersion among the buyers thereof was clearly inconsistent with reliance upon an appraisal, and since this sale was consented to by the appellees they waived the appraisement." (Appellant's Brief, p. 77.)

This is not only a misstatement as to the consent to the sale by the appellees, but it will be remembered that the sale took place on April 22, 1930. The proofs of loss were filed on December 26, 1929. The policy provides that an appraisement must be completed within ninety days after the preliminary proof of loss, or the insured may bring action. (Vol. I, p. 312.) It is also provided that a loss shall be payable within thirty days after the amount has been ascertained by agreement or appraisal. (Vol. I, p. 313.) We therefore find that the time for completing an appraisal had expired a month prior to the sale.

On page 86 we found the statement referring to the question of prices, that

> "The evidence shows that the whole matter was thoroughly discussed and there was full knowledge on both sides before the proofs of loss were filed."

The only evidence of any discussion relative to pricing was that with R. V. Smith, who did not rep-

resent this appellee. The evidence also shows that Smith informed Hyland that if he insisted on pricing the inventory in the manner then indicated, that he would vitiate his policy. To this Hyland replied that he would take his chances.

On page 97, it is stated that

> "In all except pricing, *appellees themselves participated,* and the pricing was done in accordance with an agreement, or supposed agreement between the adjuster for appellees and the adjuster for appellant; * * *".

Again we state that the only evidence of any kind as to participation in any of these matters, or as to an alleged agreement, was between R. V. Smith, who did not represent this appellee, and Sugarman. We have also shown that the pricing was not done in accordance with the agreement, which was on the basis of landed costs plus a reasonable expense, whereas the pricing was actually done on a retail price basis, plus ½¢ a yard, and in addition the grade of material was raised.

Again, on page 98, we find the statement that

> "* * * an auction sale of the salvaged merchandise was consented to by appellees * * *".

We have already discussed this relative to a similar misstatement of the facts.

It is also stated that

> "In view of the fact that appellees were given full access to appellant's books, that they were furnished everything they asked for, in so far as

appellant's books are concerned, the statement of the trial court that appellant deliberately suppressed the records is not only entirely without foundation, but it is absolutely contrary to the evidence and demonstrates the erroneous view which controlled the trial court in making its decision in this case." (Appellant's Brief, p. 83.)

Here again counsel for appellant has gone beyond the limit to which we can extend an excuse based on ignorance of the facts. As a matter of fact, although we made a demand for the production of the books and records of appellant, this was refused. We made constant demands during the course of the trial, and it was not until after many days had elapsed and the court had repeatedly instructed appellant to produce his books that we were able to make any examination of any kind.

AS TO THE EIGHTH ERROR RELIED UPON.

Appellant claims that "the court erred in failing to find the amount of plaintiff's loss as represented by unsalvaged merchandise as distinguished from salvaged merchandise and burned out of sight merchandise."

In this respect appellant states, despite the fact that we find a constant complaint that the court failed to make findings, that "the court found the out of sight loss was approximately $2,000." Let us again repeat the court's statement in regard to this. It is said:

> "I believe that some of the stock was burned out of sight but that the amount was small. *If it were necessary to determine the amount of the out of sight loss, I should find* that it was the difference between the perpetual inventory kept by plaintiff as of the date of the fire, and the merchandise removed after the fire and counted by Radford, or *approximately the sum of $2,000.*" (Italics ours.) (Vol. I, p. 185.)

It will be remembered that there is not one word of evidence introduced by appellant to show the value or the kind of merchandise which was burned out of sight. True, in the proof of loss, and in the memorandum, Exhibit B, it shows a contention that over $15,000 was totally destroyed or obliterated. It is also true that the only method of accounting for the $46,000 discrepancy as indicated by the second report of Hood & Strong, is to claim that this was merchandise burned out of sight. We have already pointed out that neither appellant, nor his bookkeeper, Mr. Taylor, nor his accountants, nor his adjuster, Mr. Sugarman, could enlighten the court in any way as to where this merchandise was or of what it consisted. On the other hand, the witnesses produced by appellees showed that there was no out of sight loss. The trial court resolved this question to the effect that the out of sight loss, if any, did not exceed $2,000. Being based on a lack of testimony on the part of appellant, and positive testimony on the part of appellees, there is not even a conflict in the evidence and the decision of the trial court will undoubtedly be sustained by this court. The only attempted proof was as to the question of debris.

Again, apparently counsel for appellant has not been able to accept the figures produced, and the claims made at the trial, for he has seen fit to reduce the amount of debris from 100 tons to 70 or 80 tons claimed to have been hauled away after the fire. The best that can be said for appellant in this respect is that there is a conflict of the evidence which the court has resolved against him. In this respect the court states:

> "As to the quantity and character of the debris there is serious conflict of testimony. In the light of the evidence which I have just discussed *it is incredible that the debris consisted to any large extent of ash or stock burned beyond recognition.*
>
> Not only does the proof show *negatively that there was no substantial quantity of merchandise obliterated by the fire,* but it shows affirmatively that the amounts claimed were fraudulently built up." (Vol. I, pp. 185-6).

In view of the fact that there is a positive finding of the court based on conflicting evidence, this court will undoubtedly sustain the finding of the trial court. We have heretofore discussed the question of debris and have shown the results of appellant's contention in this respect.

AS TO THE NINTH ERROR RELIED UPON.

Appellant claims that "the court erred in finding that the pricing and grading of the merchandise on the Radford inventory was fraudulently padded, and

that there was deception as to price or quality, and fraudulent manipulations of records by plaintiff."

We have already discussed at length the question of pricing of the Radford inventory and the raising of the 36-8 burlap to 36-9 and 40-8 to 40-10. We have also shown that appellant has admitted this change of grades in his Exhibit 165.

In regard to the statements of the court as set forth in the extracts of the opinion on pages 81 and 82 of the brief, we have already pointed out that these statements are amply supported by the evidence. The best that can be said in appellant's favor is that in some instances there is a conflict of the evidence. In view of the fact that the trial has resolved this conflict in favor of appellees, his findings will undoubtedly be followed by this court. As a matter of fact, counsel for appellant admits that "it was a fact that certain merchandise appearing on the Radford inventory was not correctly graded," and yet, as we have shown, Mr. Taylor, under the instructions of appellant, priced these goods knowing that they had no merchandise of that description, putting on them a price as though they actually possessed such merchandise, and at a figure ½¢ in excess of retail selling price.

As we have also shown, appellant signed and swore to the proofs of loss setting forth thousands of yards of material of this description, although he also knew that they had no such merchandise as he made all purchases and sales. We have also shown that in this sworn proof of loss he set forth the replacement value of bags at a figure of $30 a thousand in excess of their

selling price. Surely there could be no better proof of fraudulent padding of the price.

As to the contention that there were no manipulations of the records by plaintiff, we have discussed at length the various stock sheets numbered 2187, 2199, 2200 and 559. We have shown that whereas stock sheets were numbered chronologically, and were dated, the dates on these stock sheets had been changed and they were so manipulated as to attempt to substantiate duplications amounting to an excess of $30,000. Such changes and manipulations could not be other than fraudulent. Again, the best that can be said in favor of appellant's contention is that there is a conflict of the evidence, which has been resolved against him by the trial court who had the opportunity of examining these exhibits at first hand, and of listening to the witnesses on both sides.

As to appellant's contention that the amount claimed by plaintiff would not overtax the factory building, we desire to call to the court's attention that we do not claim that merchandise of the value of $132,000 would have overtaxed the building, or that this building could not have held merchandise representing such a value. It is our claim, and we believe we have heretofore amply demonstrated the same, that to give any effect to appellant's claim that there was 100 tons of debris, or even 70 or 80 tons of debris representing the remains of merchandise totally destroyed or obliterated, the building would not have held this amount of merchandise. In addition we have shown that the debris would have represented obliterated merchan-

dise of a value of approximately $320,000, whereas appellant's highest claim is that there was merchandise of the value of $132,000 in the building as against the figure of $88,000 as shown by his perpetual inventory. We also claim that it has been amply demonstrated and it has been found by the trial court as a matter of fact that the value of the merchandise on the premises at the time of the fire did not exceed $88,000, and that practically all of this merchandise was salvaged. We have also shown, and it has been found by the court, that 75% of the salvaged merchandise was not damaged in any way by either fire or water.

AS TO THE TENTH ERROR RELIED UPON.

Appellant claims that "the court erred in finding that plaintiff ever or at all, repudiated the accuracy of plaintiff's books."

Appellant refers to the following finding of the court:

> "Plaintiff, on the witness stand, devoted most of the first day of the trial to establish the accuracy and completeness of his books. Numerous forms were introduced in evidence which had been devised by him as the careful executive in direct supervision of his business, to follow the materials from receipt through the process of manufacture and sale so that at any time the contents of the factory could be calculated. Subsequently, in the course of the trial plaintiff repudiated the accuracy of these books." (Appellant's Brief, p. 90.)

In the brief it is stated:

> "The record shows that appellant made no statement as to the accuracy of his books, nor did he ever repudiate their accuracy. * * * He made no claims or representations in reference to his books, but at all times invited their examination by accountants for appellees." (Appellant's Brief, p. 91.)

We have already pointed out that instead of inviting any examination by appellees or their accountants, appellant threw every possible obstacle in the way of the appellees and refused to permit them or their accountants to examine these books. Even when the court ordered such an examination it was made as difficult as possible for our accountants to have access to these books. In view of this statement of counsel for the appellant, and in view of the fact that it is said it is made "to show the complete error of the viewpoint under which the trial court was laboring when deciding this case", we desire to refer to two statements of counsel which do not appear in this transcript, but which we quote from the typewritten reporter's transcript. As we have heretofore pointed out, we do not like this form of procedure, but in view of attacks that have been made on a judge who has been summoned from our midst, we believe we are justified in calling the court's attention to matters upon which he based statements in his opinion which were known to all the counsel in the case. These statements are made by counsel who did not sit through the trial, and are either based on ignorance or on a deliberate attempt to mislead this court.

"Mr. Schmulowitz. I may say for the benefit of the Court that it is to disclose to the Court the comprehensive records that were maintained by the Hyland Bag Company in the prosecution of its business during the year 1929, and that was in full force and effect at the date of the fire, supplemented by other books and records, all of which records have been made the subject of audit on the part of various firms of certified public accountants in order that the Court may ultimately determine the weight to which the audits made by the certified public accountants are entitled. * * * *It is quite natural for counsel to question and for the Court to call upon the plaintiff to explain why, if the plaintiff after a fire files a proof of loss in which he first asks for some seventy thousand dollars odd, does he later come into court and inform the Court that instead of his loss being some seventy thousand dollars odd, that in truth his loss is some one hundred and eight thousand dollars. Now, in order to fully explain that, it becomes in part important to understand the comprehensive system of records that were maintained by the plaintiff at the time of the fire and prior thereto.* Later on there will be disclosed the basis or formula upon which the first proof of loss was filed, the inaccuracies and fallacies of that report will be disclosed to the Court, and the accuracy and the dependable quality of the present claim will be demonstrated by men skilled in the profession of accounting and by actual reference to original records of which these forms are mere exemplars of the records maintained in the office of the Hyland Bag Company.

* * * * * * *

Mr. Thornton. In addition to that I would like to point out this fact: *You will remember we have asked for an examination of these very carefully kept books, but so far we have been deprived of any examination.*

Mr. Schmulowitz. Evidently the Court thought you were not entitled to an examination at the time you asked for it." (Rep. Tr. pp. 31-33.) (Italics ours.)

Later on, and after we had pointed out the changing and juggling of the records and accounts by this appellant, Mr. Schmulowitz states:

"*Counsel says that the books are filled with inaccuracies. I admit it. I proclaim that. I proclaim the inaccuracies. I am not relying upon the books for the simple reason that the books are replete with errors, and being so, is the Court going to decline to go behind those errors in the books?*" (Rep. Tr. p. 1077.) (Italics ours.)

Surely the trial court did not refuse to go behind the errors in the books. He went farther and found that the errors and changes in the records were made by or under the direction of the appellant for the purpose of cheating and defrauding these insurance companies. If we have failed to convince this court of these facts, it is due entirely to our inability to properly summarize and brief the evidence, which was absolutely conclusive along these lines. The evidence relative to the forms of records to which the court refers, which covered practically an entire day's testimony, is boiled down in the transcript in

this case to pages 262 to 282, inclusive, Volume I. Appellant states:

> "These forms were made up by me." (Vol. I, p. 267.)

In regard to their broken bale lots, he says:

> *"We were always able to account for every yard."* (Vol. I, p. 281.) (Italics ours.)

One of appellant's witnesses, and employee, Willis G. Ledgett, testified:

> "In the movement of that material records were kept and checked on the various forms in use by the Hyland Bag Company, because it was our duty to check every bale of merchandise that entered the house, because the United States Government checked over our scales and assessed the duty on weights we gave the Government. *Therefore, we knew the weight and the number of every bale that came in the house."* (Vol. II, p. 634.)

We have already shown that Taylor testified that they had fine records from May 31st to October 19th, and that he would say that 99.9% of the information as to the receipt of goods is correct. We shall not attempt to again set forth the testimony as to the inaccuracy of the records or as to changes in them. Nor shall we analyze the testimony of the various accountants relative to these books. Mr. Taylor, after we had pointed out these changes and inaccuracies, tells us that he had not touched the books and that they were not closed until November. (Vol. III, p. 1534.) He further states:

"As to telling you that my books were very inaccurate, well, every man that has handled them has so testified." (Italics ours.) (Vol. III, p. 1579.)

AS TO APPELLANT'S QUERY "IF APPELLANT IS ENTITLED TO RECOVER, WHAT IS THE AMOUNT HE SHOULD RECOVER, AND HOW SHOULD IT BE APPORTIONED?"

To state the situation in slightly different language from that employed by appellant, we desire to state it is equitably unthinkable that the judgment herein should be reversed. Appellant's counsel states that the

> "* * * loss probably lies somewhere in between the amount admitted by appellees and the amount claimed by the appellant, that is, somewhere between $35,000 and $106,000." (Appellant's Brief, p. 99.)

Yet, appellant has never introduced any evidence which would show that he actually suffered loss or damage, or of what that loss or damage consisted. On the other hand, we have affirmatively shown, and the court has decided, that the claim presented was false and fraudulent and made for the purpose of attempting to cheat and defraud these insurance companies. Counsel states:

> "It is to be noted that at the time of the fire appellant had a net worth of $325,000.00 to $375,000.00; that his sales averaged over $2,000,000.00 per year, and that he had unusual bank credits indicating that he was a man of good reputation and standing in the community (V. I, p. 547); he was a director and large stock-

> holder in a local banking institution. (V. I, p. 235.) The decision herein reflecting upon the character of appellant has swept away the work of years and inflicted immeasurable injury upon him as a business man.'' (Appellant's Brief, p. 95.)

We are indeed glad that appellant has made such a plea. We could have some sympathy with a man of small means and a man of no standing in the community who might attempt to recover a little more than his small loss. The mere fact that this appellant was a director and large stockholder in a local banking institution, and that he was worth in excess of $300,000, certainly does not show he had a good reputation. Many a man has accumulated means by the use of crooked and fraudulent methods. This appellant has been exposed in this one instance. We are indeed glad that this decision of the trial court, with its sweeping indictment of the character of this man, was directed at a person of wealth. It goes far to disprove the current statement that the courts will penalize only the poor and not the wealthy. If appellant did have a good reputation, and if he did have a standing in the community, he should have considered that reputation and that standing before attempting to perpetrate such a fraud as we were able to uncover during the course of this trial.

As to sweeping away the work of years, our evidence shows that as a matter of fact the loss was nowhere near so great as we at first thought, that instead of being somewhat less than $35,000 it was approximately $10,000. The penalty imposed upon

this appellant for his fraud, false swearing and perjury is indeed only too small. The boldness of the request that "appellant asks this court to restore both his good name and his purse to him" (Appellant's Brief, p. 96) is in line with the attempted burning of this plant and the attempted defrauding of the insurance companies. The lower court expressed his reluctance to find that any man could follow the course of action adopted by appellant, and those of us who knew that judge can well realize his reluctance to find that anyone was a crook and a perjurer.

Appellant closes his brief with a prayer that this court "compensate appellant for his loss and vindicate his honor in this community". (Appellant's Brief, p. 99.)

We respectfully submit that this court should affirm the judgment and let this appellant stand forth in this community with the brand which the trial court was forced to put on him as a result of his own fraud, false swearing and perjury.

Dated, San Francisco,
April 17, 1936.

Respectfully submitted,
H. A. Thornton,
Thornton & Watt,
Thornton & Taylor,
Attorneys for Appellee,
Western Insurance Company of America.